TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted]

THE HARDIN-WYANDOT LIGHTING COMPANY, PLAINTIFF IN ERROR,

vs.

THE VILLAGE OF UPPER SANDUSKY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED [redacted]

(25,491)

(25,491)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 661.

THE HARDIN-WYANDOT LIGHTING COMPANY, PLAINTIFF IN ERROR,

vs.

THE VILLAGE OF UPPER SANDUSKY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 9, 1917.

1 In the Supreme Court of the State of Ohio.

UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio, this first day of September A. D. 1916.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.
By SEBA H. MILLER,
Deputy Clerk.

2 In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE VILLAGE OF UPPER SANDUSKY, Defendant in Error.

Petition for Writ of Error.

Considering itself aggrieved by the final decision and judgment of the Supreme Court of Ohio in rendering final judgment against it in the above entitled case, the plaintiff in error, The Hardin-Wyandot Lighting Company, hereby prays a writ of error from the said decision and final judgment to the United States Supreme Court.

Assignment of Errors and Prayer for Reversal herewith.

ANDREW SQUIRE,
CAREY & HALL, AND
SQUIRE, SANDERS & DEMPSEY,
Attorneys for Plaintiff in Error, The Hardin-Wyandot Lighting Company.

STATE OF OHIO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by The Hardin-Wyandot Lighting Company to the Village of Upper Sandusky, Ohio, in the sum of Three thousand ($3,000.00) Dollars.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Dated August 11th, 1916.

3 [Endorsed:] No. 14996. The Hardin-Wyandot Lighting Company, a Corporation, Plaintiff, vs. The Village of Upper Sandusky, Defendant. Petition for Writ of Error. Filed Aug. 12, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

4 In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE VILLAGE OF UPPER SANDUSKY, OHIO, Defendant in Error.

Waiver of Service of Citation and Entry of Appearance.

The Village of Upper Sandusky, Ohio, defendant in error in the above entitled case, by its duly elected, qualified and acting solicitor, the attorney of record for the defendant in error herein, hereby waives the service of citation and voluntarily enters an appearance in the Supreme Court of the United States.

W. R. HARE,
Attorney of Record and Solicitor for the Village of Upper Sandusky, Ohio.

Aug. 7/16.

5 [Endorsed:] No. 14996. The Hardin-Wyandot Lighting Company, a Corporation, Plaintiff, vs. The Village of Upper Sandusky, Ohio, Defendant. Waiver of Service of Citation and Entry of Appearance. Filed Aug. 12, 1916. Supreme Court of Ohio, Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

6 In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE VILLAGE OF UPPER SANDUSKY, OHIO, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Now comes the plaintiff in error and files herewith its petition for a writ of error, and for cause says there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

Plaintiff in error, The Hardin-Wyandot Lighting Company, is a public service electric light and power corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and is the owner of an electric light and power plant and appurtenances in the Village of Upper Sandusky and the streets thereof.

By purchase in 1911 the plaintiff in error duly acquired the plant, fixtures and franchise rights of its predecessor in title, The Citizens Electric Light & Power Company, and until the final judgment of the Supreme Court of the State of Ohio was operating said plant and claiming all of the rights and privileges in the franchise granted to the original Company, its successors and assigns, by the State of Ohio, pursuant to an act of the Legislature of the State of Ohio passed January 26th, 1887, giving it the right to use the streets, alleys, lanes, lands, squares and public places of the municipality without the consent of such municipality, the same as magnetic telegraph and telephone companies.

7 Under date of April 21st, 1896, the Legislature of the State of Ohio passed an act, the validity of which is drawn in question. The final judgment of the Supreme Court of Ohio is in favor of the validity of the Statute of 1896, which attempts to deny the right of the electric light and power companies created under the laws of Ohio to use the streets, alleys, lanes, lands, squares and public places of a municipality without the consent of such municipality.

By the final judgment of the Supreme Court of Ohio, the plaintiff in error is deprived of a further exercise of its franchise rights without the consent of the defendant in error, The Village of Upper Sandusky, Ohio. The final judgment is in favor of the validity of a subsequent statute, impairing the contract rights of a prior statute, contrary to the provisions of the Constitution of the United States.

The Supreme Court of Ohio erred in holding and deciding that franchise rights granted to the plaintiff in error under a former statute of the State of Ohio could be forfeited or impaired by a subsequent statute; erred in deciding that a franchise granted by the State of Ohio to the plaintiff in error by the terms of which the plaintiff in error was given the right to use the streets of the defendant in error for the purpose of stringing its wires and other apparatus for street and commercial lighting could be forfeited by a failure on the part of the plaintiff in error to continue street lighting; erred in deciding that the defendant in error could by councilmanic legislation take away or impair the franchise rights of the plaintiff in error theretofore granted it under a legislative enactment of the State of Ohio; erred in finding that there could be an abandonment of a franchise right predicated upon an alleged default of the plaintiff in error to maintain street lighting in the absence of legal contract with the defendant in error; erred in finding that the amendatory act of the Legislature of the State of Ohio under date of April 21st, 1896, deprived the plaintiff in error from the exercise of rights theretofore granted it without the consent of the defendant in error; erred

in finding that the plaintiff in error could abandon a part of
8 its franchise rights; erred in finding that the franchise rights granted to the plaintiff in error by a legislative enactment under the Act of January 26th, 1887, were divisible; erred in finding that such franchise rights depend upon the user and occupancy of the streets.

Said errors are more particularly set forth as follows:

1. The final judgment of the Supreme Court of Ohio draws in question the validity of a statute on the ground of its being repugnant to the Constitution of the United States; is in favor of the validity of such statute; and thereby holds as valid a subsequent statute which impairs the contract rights granted by a former statute.

2. The Act of the Legislature of the State of Ohio, passed under date of April 21st, 1896, is repugnant to Article I, Section 10 of the Constitution of the United States in so far as it deprives the plaintiff in error from an exercise of the rights granted by the Act of January 26th, 1887, and impairs the obligation of contract created by such act.

3. The final judgment of the Supreme Court of Ohio gives effect and validity to a legislative enactment of the State of Ohio which impairs contract rights granted by a former statute, repugnant to Article I, Section 10, of the Constitution of the United States.

4. The final judgment of the Supreme Court of Ohio draws in question the validity of councilmanic acts of the defendant in error; is in favor of their validity; and gives effect to such acts declaring forfeited the franchise rights of the plaintiff in error granted to it by a prior legislative enactment of the State of Ohio.

5. The final judgment of the Supreme Court of Ohio gives effect to legislative enactments which impair the obligation of contract rights neither forfeited nor abandoned.

For these errors the plaintiff in error prays that the final judgment of the Supreme Court of Ohio dated the 15th day of February, 1916, be reversed, and that a judgment be entered for the plaintiff in error and for costs.

ANDREW SQUIRE,
CAREY & HALL AND
SQUIRE, SANDERS & DEMPSEY,
Attorneys for The Hardin-Wyandot Lighting Company, Plaintiff in Error.

9 [Endorsed:] No. 14996. The Hardin-Wyandot Lighting Company, a Corporation, Plaintiff, vs. The Village of Upper Sandusky, Defendant. Assignment of Errors and Prayer for Reversal. Filed Aug. 12, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

10 In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, Plaintiff in Error,
v.
THE VILLAGE OF UPPER SANDUSKY, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Ohio before you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Hardin-Wyandot Lighting Company, plaintiff in error, and The Village of Upper Sandusky, defendant in error, the same being Case No. 14,996 upon the dockets of the Supreme Court of Ohio, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, and manifest error hath happened to the great damage of The Hardin-Wyandot Lighting Company, as by

11 their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in their behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 14th day of August, 1916.

B. C. MILLER,
Clerk U. S. District, Northern District of Ohio.

Cleveland, Ohio.

[Seal of the District Court, Northern District of Ohio.]

Allowed this 11th of August A. D. 1916.

HUGH L. NICHOLS,
Chief Justice Supreme Court of Ohio.

12 [Endorsed:] No. 14996. In the Supreme Court of Ohio. The Hardin-Wyandot Lighting Company, Plaintiff in Error, v. The Village of Upper Sandusky, Defendant in Error. Writ of Error. Filed Aug. 15, 1916. Supreme Court of Ohio, Frank E. McKean, Clerk.

13 In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, a Corporation, Plaintiff in Error,

vs.

THE VILLAGE OF UPPER SANDUSKY, Defendant in Error.

Precipe.

To the Honorable Frank E. McKean, Clerk of the Supreme Court of the State of Ohio:

Will you kindly forward to the Clerk of the Supreme Court of the United States of America, Hon. James D. Maher, a complete transcript of the record in the above entitled case, including a copy of the Court's opinion, together with—

1. A copy of the assignment of errors.
2. A copy of the prayer for reversal as contained in the assignment of errors herein filed.
3. The original petition for writ of error, together with its allowance.
4. A copy of the bond and its approval.
5. The original writ of error with the allowance thereof.
6. Statement showing bond, petition for writ of error, copies of writ of error and citation lodged with the Supreme Court of the State of Ohio.
7. The original citation with waiver of service and entry of appearance of the defendant in error.
8. Return of writ of error and statement of costs.

Respectfully yours,

ANDREW SQUIRE,
CAREY & HALL,
SQUIRE, SANDERS & DEMPSEY,
Attorneys for The Hardin-Wyandot Lighting Company, Plaintiff in Error.

14 [Endorsed:] No. 14996. The Hardin-Wyandot Lighting Company, a Corporation, Plaintiff, vs. The Village of Upper Sandusky, Defendant. Precipe. Filed Aug 12 1916, Supreme Court of Ohio, Frank E. McKean, Clerk. Squire, Sanders & Dempsey, Cleveland.

15 Supreme Court of Ohio, January Term, 1915.

No. 14996.

Attorneys.	Title of case.	Action.	Fees & costs.	Paid by.
Ellis R. Diehm. T. H. Kirby. Squire, Sanders and Dempsey. Carey & Hall. D. C. Parker. W. R. Hare. Clyde Merchant.	The Hardin-Wyandot Lighting Company. vs. The Village of Upper Sandusky	Petition Error to the Court of Appeals of Wyandot County	$5.00	T. M. Kirby

Docket Entries.

Date.	Memoranda of Pleadings, &c., Filed, Writs Issued, &c.
Aug. 7, 1915.	Petition in Error filed.
Aug. 7, 1915.	At Chambers. Stay of Execution allowed. Bond $2000.00. See Entry—J-27-159.
Aug. 12, "	Waiver of Sum-ons filed.
Aug. 17, "	Court of Appeals Transcript and original papers (Nos. 1 to 17 inc.) filed.
Sept. 2, "	Papers sent Gates Legal Pub. Co. by Express 9/16/15 Ret'd.
Sept. 16, "	Printed Record filed. 9/18/15 P. of S. filed) 9/20/15 P. of S. (Merchant) filed.
Oct. 13, "	Pltffs. Printed Brief filed. 10/19/15 P. of S. filed.
Nov. 3, "	Papers sent D. C. Parker by Express. 11/30/15 Retd.
" 13, "	Defts. Printed Brief filed. 11/16/15 P. of S. filed.
" 23, "	Pltffs. Printed Reply Brief & Proof of service filed.
Feb. 15, 1916.	Judgment Affirmed. Opinion. J. 27-257.
" 22, "	Original papers sent to clerk.
Mch. 14, "	Ten Printed Copies Application for Re-hearing filed.
Apr. 27, "	Re-hearing refused.
May 2, "	Mandate issued.
Aug. 12, "	Petition for writ of error (allowed by Chief Justice, Hugh L. Nichols) filed.
" " "	Waiver of Service of Citation & Entry of appearance filed.
" " "	Assignment of Error & Prayer for Reversal filed.
" " "	Precipe for Transcript filed.
" 15, "	Writ of Error filed.
Sept. 1, "	Bond ($3000) with Am. Surety Co. of N. Y. as surety approved by Nichols, C. J. filed.
" " "	Copies of writ lodged for deft in error and Clerk.

16 Supreme Court of the State of Ohio.

No. 14996.

At Chambers.

Columbus, Ohio, August 7th, 1915.

Transcript of Journal Entries.

It is ordered by the Court that the execution of the judgment in this cause be and the same hereby is stayed until the further order of this Court or of a Judge or Judges thereof, upon the execution of a bond in the sum of two thousand dollars to the satisfaction of the Clerk of the Court of Appeals of Wyandot County, and the injunction allowed by the Court of Appeals is hereby suspended except that part thereof restraining plaintiff in error from erecting further poles, wires, lamps or other structures than those already constructed upon or over the streets, alleys and public places in the Village of Upper Sandusky, until the consent of said Village is obtained, or until the further order of this Court or a Judge or Judges thereof.

MAURICE H. DONAHUE,
THOMAS A. JONES,
Judges.

Journal—27, Page 159.

Tuesday, 15th. Day of February, 1916.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Wyandot County, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this Court, that the Judgment of the said Court of Appeals be and the same is hereby affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered, That a special mandate be sent to the Court of Appeals of Wyandot County, to carry this judgment into execution.

Journal 27—Page 257.

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Copy.

In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, a Corporation, Plaintiff in Error,
vs.
THE VILLAGE OF UPPER SANDUSKY, Defendant in Error.

Bond.

(Filed Sept. 1, 1916.)

Know all men by these presents, That we, The Hardin-Wyandot Lighting Company, a corporation, as principal, and the American Surety Company of New York a corporation of the State of New York, as surety, are held and firmly bound unto the Village of Upper Sandusky, Ohio, in the sum of Three Thousand & no/100 Dollars ($3,000.00), to be paid to the said obligee, to the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Witness the execution hereof this 12th. day of August, A. D. 1916.

Whereas, the above named principal seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the final judgment rendered in the above entitled action by the Supreme Court of Ohio,

Now, Therefore, the condition of this obligation is such that if the above named principal shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

THE HARDIN-WYANDOT LIGHTING COMPANY,
By SQUIRE, SANDERS & DEMSEY,
Its Attorneys.
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By CHARLES R. ECKERT, *Attorney in Fact.*

Witness—
ELLIS R. DIEHM.

Attest:
J. H. KIRBY,
Res. Ass't Sec'y.

STATE OF OHIO,
Cuyahoga County, ss:

On the 12th. day of August, A. D. 1916, before me personally appeared William C. Boyle, who being by me duly sworn deposes and says that he is a member of the firm of Squire, Sanders & Dempsey attorneys for The Hardin-Wyandot Lighting Company, and that the execution of the foregoing bond on behalf of said Company in the manner above set forth has been fully authorized by said Company.

WILLIAM C. BOYLE.

Sworn to, acknowledged before me, and subscribed in my presence this 12th. day of August, 1916.

[SEAL.] ELLIS R. DIEHM,

Approved:
HUGH L. NICHOLS,
Chief Justice, Supreme Court of Ohio.

18 STATE OF OHIO,
Franklin County, ss:

On this 1st. day of Sept. 1916, before me personally appeared Charles R. Eckert known to me to be the attorney in fact of the American Surety Company of New York, the Corporation described in, and which executed, the foregoing bond of The Hardin-Wyandot Lighting Company, as surety thereon, and who being by me duly sworn deposes and says that he resides in the City of Columbus, State of Ohio; that he is attorney in fact of said the American Surety Company of New York, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of New York, and that said Company has complied with the provisions of the Act of Congress allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond is the corporate seal of the American Surety Company, and was thereto annexed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as an attorney in fact for said Company, and that the assets of said Company, unencumbered and liable to execution, exceed any debts, claims and liabilities whatsoever greatly in excess of the amount of said bond, *i. e.* Three Thousand ($3,000.00) & no 100-Dollars.

CHARLES R. ECKERT.

Sworn to before me and subscribed in my presence this 1st. day of Sept. 1916.

[SEAL.] ARTHUR J. HARLEY,
Notary Public.

I, Frank E. McKean, Clerk of Supreme Court of the State of Ohio, certify the foregoing to be a true and correct copy of Original Bond on file in my office and in possession of said Court.

In witness whereof I have signed my name officially and placed the Seal of the said Supreme Court hereon, this, 1st. day of September, A. D. 1916.

[Seal, The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.
By SEBA H. MILLER, *Deputy.*

19 *Certificate of Lodgment.*

SUPREME COURT, STATE OF OHIO, *ss:*

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as Clerk on September first, 1916, in the case of The Hardin-Wyandot Lighting Company, plaintiff in error, against The Village of Upper Sandusky, defendant in error,

1. The original bond, a copy of which is herein set forth.
2. Two copies of the writ of error as herein set forth, one for the defendant in error and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Court at my office in Columbus, this first day of September, A. D. 1916.

[Seal, The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.
By SEBA H. MILLER,
Deputy Clerk.

20 In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, Plaintiff in Error,
vs.
THE VILLAGE OF UPPER SANDUSKY, Defendant in Error.

Certificate.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing petition for writ of error and order allowing writ, assignment of errors, writ of error, waiver of service of citation and entry of appearance and precipe for transcript, are the original papers filed in this Court in the above entitled cause; that the foregoing copy of bond is a true copy of the original bond filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copies from the Records of said Court; that a true copy of the Record as filed

in this Court in said cause is hereto attached, and that a certified copy of the opinion of the Court is also hereto attached.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this first day of September, A. D. 1916.

[Seal, The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.
By SEBA H. MILLER,
Deputy Clerk.

21 In the Supreme Court of Ohio.

No. 14996.

Error to the Court of Appeals of Wyandot County.

THE HARDIN-WYANDOT LIGHTING COMPANY, Plaintiff in Error,
vs.
THE VILLAGE OF UPPER SANDUSKY, Defendant in Error.

Record.

Squire, Sanders & Dempsey, Carey & Hall, Attorneys for Plaintiff in Error.

Clyde Merchant and W. R. Hare, Attorneys for Defendant in Error.

Filed Sep. 16, 1915, Supreme Court of Ohio. Frank E. McKean, Clerk.

22 In the Supreme Court of Ohio.

No. 14996.

THE HARDIN-WYANDOT LIGHTING COMPANY, Plaintiff in Error,
vs.
THE VILLAGE OF UPPER SANDUSKY, Defendant in Error.

Petition in Error.

(Filed in Supreme Court Aug. 7, 1915.)

The plaintiff in error, The Hardin-Wyandot Lighting Company, a corporation, complains of the defendant in error, the Village of Upper Sandusky, Ohio, for that at the July Term, A. D. 1915 of the Court of Appeals in and for Wyandot County, the defendant in error recovered a judgment by the consideration of the said Court of Appeals in a cause pending therein, wherein said plaintiff in error was appellee and said defendant in error was appellant, reversing a certain judgment which the said The Hardin-Wyandot Lighting

Company had theretofore recovered against said the Village of Upper Sandusky, by the consideration of the Court of Common
23 Pleas of said County and for the costs of said action in said Court of Appeals.

Plaintiff in error says that there is error prejudicial to it manifest upon the record of said judgment of said Court of Appeals in said action in this, to-wit:

1. That the said Court of Appeals erred in reversing the judgment theretofore rendered by the said Court of Common Pleas.

2. That the said Court of Appeals erred in refusing to affirm the said judgment of the Court of Common Pleas theretofore rendered.

3. That the said Court of Appeals erred in refusing to dismiss the said petition of the said defendant in error.

4. That the said Court of Appeals erred in granting an injunction as praved for by the said defendant in error.

5. That the judgment of said Court of Appeals is in violation of Article 1, Section 10, of the Constitution of the United States, which provides as follows:

"No State shall enter into any treaty, alliance or confederation, grant letters of marque, or reprisal, coin money, emit bills of credit, make anything but gold and silver coin tender in payment of debts, pass any bill of attainer, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility."
24 in that the said judgment gives sanction to the legislative acts of the said Village of Upper Sandusky, Ohio, impairing the obligation of contracts, and impairs the obligation of the contract existing between the plaintiff in error and the State of Ohio.

6. That the said judgment of the said Court of Appeals is in violation of Article 14, Section 1, of the Constitution of the United States, which provides as follows:

"All persons born or naturalized in the United States are subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
in that the judgment of the Court of Appeals gives sanction to the legislative enactments of the Village of Upper Sandusky taking property of the said The Hardin-Wyandot Lighting Company without due process of law.

7. That the judgment of the said Court of Appeals is in violation of Article 1, Section 19, of the Constitution of the State of Ohio, in that the said judgment gives sanction to the legislative acts of the said Village of Upper Sandusky, denying the right of The Hardin-Wyandot Lighting Company to hold its property inviolate.
25 8. That the judgment of said Court of Appeals is in violation of Article 2, Section 28, of the constitution of the State of Ohio, in that said judgment gives sanction to the legislative acts of the Village of Upper Sandusky, which are retroactive in their

nature and impair the obligation of the contract existing between the plaintiff in error and the State of Ohio.

9. That the judgment of the Court of Appeals will result in the taking of the property of the plaintiff in error without due process of law.

10. That the said Court of Appeals was without jurisdiction to declare by its judgment a forfeiture of the contract rights of the plaintiff in error, as the form of action in which said judgment was rendered was not one in which forfeiture could be declared.

1-. For further errors prejudicial to the plaintiff in error manifest upon the face of the record.

All of which errors will more fully appear by reference to the original papers, pleadings, transcript of docket and journal entry in said Court of Common Pleas and said Court of Appeals, and the agreed statement of facts and transcript of evidence filed therein, all of which are herewith filed and made a part hereof.

Wherefore, plaintiff in error prays that said judgment of the said Court of Appeals against it may be reversed, and that this Court may render such judgment as the said Court of Appeals should
26 have rendered; and that the said plaintiff in error may be restored to all things it has lost by reason thereof.

THE HARDIN-WYANDOT LIGHTING COMPANY.
By SQUIRE, SANDERS & DEMPSEY,
CAREY & HALL,
Its Attorneys.

(Entry Waiving Service of Summons in Error omitted.)

Petition.

(Filed in Court of Common Pleas Aug. 1, 1914.)

The plaintiff is a municipal corporation duly organized under the laws of the State of Ohio.

The defendant is a corporation duly organized under the laws of the State of Ohio.

For its cause of action herein plaintiff says that on the 4th day of March, A. D. 1889, the council of the village of Upper Sandusky, Ohio, plaintiff herein, passed an ordinance granting to The Citizens Electric Light & Power Co., an Ohio corporation, its associates, successors and assigns, certain privileges and extending to said Company a franchise to use the streets, lanes, alleys, avenues and other public thoroughfares of said village for the purpose of erecting, maintaining and operating an electric light and power plant, a copy of said ordinance is hereto attached and made a part of this petition, marked "Exhibit A".

27 That on or about the — day of —— 1912, the defendant herein purchased the plant and fixtures of the said The Citizens Electric Light & Power Company, took possession of the same

and are now operating said plant and claiming all of the rights and privileges in said franchise contained and which were exercised by the original Company therein named.

That said ordinance and franchise was and is silent as to its period of duration, there being no limitation as to length of time it was to remain in force nor is there any stipulation as to when it should terminate.

That the said The Citizens Electric Light & Power Company, when it built and completed said electric light plant installed a complete system for lighting the streets, lanes, alleys, avenues and other public thoroughfares of said village, and did, under and by virtue of a contract light said public thoroughfares during all of the time it was the owner of said plant.

That shortly after the said defendant herein became the owner of said plant and said street lighting system, and after the contract in force at the time of said purchase had expired, the plaintiff herein made repeated efforts to make a new contract or agreement with the defendant for the lighting of the streets, lanes, alleys, avenues, etc., of said village, but was unable so to do for the reason that the prices asked by said defendant for such services were ex*bor*bitant
28 and unreasonable and were by the council of said village considered so far beyond the means of said village that it was impossible to accept them.

That on or about the — day of August, A. D. 1913, the said plaintiff had prepared and caused to be submitted to said defendant, a full, fair and complete schedule of prices said village was willing to pay for the lighting of the said streets, etc., thereof, including the number of lights required, the manner of distributing the same, the kind of posts or standards required, together with a schedule to be charged by said defendant for electricity for purposes other than public lighting and for heat and power.

This proposition on the part of said plaintiff was submitted to said defendant on the 16th day of August and was by said defendant refused and rejected the terms and conditions named in said proposition, but failed, refused and neglected to return the same to this plaintiff, claiming that if the rates proposed by it as to commercial electricity were not satisfactory, said plaintiff should or could take the matter up with the Public Service Commission of Ohio, and thereupon said defendant failed and refused to make any further attempts to arrive at a fair and just settlement of the matters in controversy.

That said defendant within a short time thereafter, without the knowledge or consent of the plaintiff, removed all of its street
29 lights from the streets, avenues and other public thoroughfares in said village, removed all of its said wires, cut down and removed all of the poles used for the support of said wires and lights and completely dismantled its street lighting system thus rendering itself wholly unable to furnish any electricity whatever for the purposes of public lighting and placed itself in such a position that it cannot light any of the public places of said village and has rendered its plant absolutely worthless for that purpose.

That said defendant Company has removed from its said plant whatever valuable machinery was there at the time the same was purchased by it from the said The Citizens Electric Light and Power Company and has replaced the same with other machinery, cheaper in its construction and second hand in quality and has by this means lowered the value of its plant and rendered itself less able to supply the commodity it purports to sell.

This plaintiff says that it cannot and does not agree with the defendant as to the terms and conditions of said purported franchise, that said defendant, by its act in demolishing and removing its street lighting system has forfeited every and all rights it may have had thereunder and that its continuing use of the streets, lanes, alleys, avenues and other public thoroughfares for the purpose of supplying its private users of electricity for its own profit is a violation of said pretended franchise both as to the letter and spirit of the same, and that said defendant Company has no right
30 whatever to use any of the public ways of said village for any of the purposes for which it is now using them.

This plaintiff further says that said defendant is about to erect along and upon the streets of said village a line of poles for the purpose of stringing additional wires to further advance its private interests; that it is so preparing to do without the consent of said village and entirely ignoring the rights of the public therein.

That said defendant, having forfeited its said pretended franchise, has no right to use any of the public ways of this village and that if it is permitted so to do, this plaintiff will suffer injury for which it has no adequate remedy at law, and said defendant should be enjoined from erecting said poles as hereinafter prayed for.

This plaintiff avers and charges the fact to be that said defendant by reason of its failing to agree with plaintiff as to the rates to be charged private consumers for electric current, its failure to agree with this plaintiff upon the amount to be paid for street lighting and its removal of its system for lighting the public highways of said village, it has forfeited any rights it had under said franchise, and that it now has no right to use and occupy said highways with its poles, wires, etc., nor has it any right to erect any additional poles for the purpose of erecting thereon new or additional wires.

31 Wherefore, this plaintiff prays that said defendant Company may be temporarily enjoined from erecting said additional poles; that upon a final hearing said injunction may be made perpetual; that said pretended franchise may be declared forfeited; that said defendant be required to remove from the public highways of said village all of its equipment now located thereon, and for all proper relief.

THE VILLAGE OF UPPER SANDUSKY, OHIO,
By CLYDE MERCHANT AND
W. R. HARE,
Its Attorneys.

(Duly verified.)

To the Clerk of said Court:

Issue a summons for the defendant to the Sheriff of this county, indorsed "Injunction Allowed. Equitable Relief Demanded," returnable according to law.

W. R. HARE,
Of Attorneys for Plaintiff.

Injunction allowed as prayed for in the above petition upon the plaintiff giving bond in the sum of $500, conditioned according to law and to the satisfaction of the Clerk of said court.

[SEAL.] WILLIS P. ROWLAND,
Probate Judge.

Fee, $2.50. Collect.

32 EXHIBIT A.

An Ordinance Granting Certain Privileges to The Citizens Electric Light and Power Company.

Be It Ordained by the City Council of Upper Sandusky, Ohio:

Sec. 1st. That the Citizens Electric Light & Power Company of Upper Sandusky, Ohio, its associates, successors and assigns, are hereby authorized and empowered to use the streets, lanes, alleys, avenues and other public thoroughfares of the City of Upper Sandusky, Ohio, and it is hereby vested with full and necessary privileges for such use, for the purpose of erecting, maintaining and operating electric light wires, mains, apparatus complete for the manufacture and distribution of electricity for light and power.

Sec. 2nd. The Citizens Electric Light & Power Company in the construction of its plant or in erecting poles and conducting their wires for the distribution of electric current, shall not unnecessarily interfere or obstruct the passage of any street, lane, alley or avenue or other thoroughfare of said City and in crossing same shall erect said wires at such altitude as council may prescribe, and whenever it shall in any way change the present condition of any such street, lanes, alleys or thoroughfares it shall replace them in as good condition as before, and in the event any litigation shall arise
33 caused by occupancy or use of the streets, lanes, alleys or other thoroughfares, said Company shall assume liability for any damage to adjoining owners or persons injuriously affected and shall at its own expense defend any such suits and indemnify the City from any loss occasioned thereby.

Sec. 3rd. The privilege hereby granted the said Citizens Electric Light & Power Company shall entitle them to manufacture, sell and distribute light and power by means of electricity to the citizens of Upper Sandusky, Ohio, for public and private uses and the property of said Citizens Electric Light & Power Company, its associates, successors and assigns, so erected on the public streets, lanes, alleys and highways, shall receive same protection under the laws of the City as the property of other corporations engaged in similar business.

Sec. 4th. Said Citizens Electric Light & Power Company shall commence work on said electric light plant within ninety (90) days from the passage of this ordinance and completed it within six months (6) thereafter, otherwise this ordinance shall be null and void and the privileges hereby granted shall be declared forfeited.

Sec. 5th. This ordinance shall take effect on and after its passage and publication.

Passed in a regular session of the council March 4, 1889.

FRANK JONAS, *Mayor.*

E. N. HALBEDEL, *Clerk.*

34 *Answer.*

(Filed in the Court of Common Pleas Oct. 9, 1914.)

Now comes The Hardin-Wyandot Lighting Company, defendant herein, and for its answer to the said petition of the said plaintiff filed in the above-entitled action, says:

It admits the corporate capacity of both the plaintiff and defendant, as alleged; admits that on the 4th day of March, 1889, the Council of the Village of Upper Sandusky, Ohio, passed an ordinance granting to The Citizens Electric Light & Power Company, its associates, successors and assigns, certain privileges and extended to said company a franchise to use the streets, lanes, alleys, avenues and other public thoroughfares of said Village, for the purpose of erecting, maintaining and operating an electric light and power plant; admits that on or about the — day of ——, 1912, The Hardin-Wyandot Lighting Company purchased the plant and fixtures of said The Citizens Electric Light & Power Company, took possession of the same, and is now operating said plant and claiming all of the rights and privileges in said franchise contained, which were exercised by the original company therein named; admits that said franchise and ordinance was and is silent as to its period of duration; admits that there is no limitation as to the length of time it was to remain in force, nor any stipulation as to when it should terminate; admits that the said Citizens Electric Light & Power Company, when it built and completed said electric
35 light plant, installed a system for lighting the streets, lanes, alleys, avenues and other public thoroughfares in said Village, and did, under and by virtue of a contract, light said public thoroughfares during all the time it was the owner of said plant.

The defendant denies that shortly after said defendant became the owner of said plant and said street lighting system, and after the contract in force at the time of said purchase had expired plaintiff herein made repeated efforts to make a new contract or agreement with the defendant for the lighting of the streets, lanes, alleys, avenues, etc., of said Village, and denies that said plaintiff was unable so to do, for the reason that the prices asked by said defendant for said services were exorbitant and unreasonable; admits that on or about the — day of August, A. D. 1913, the said plaintiff prepared

and caused to be submitted to said defendant a schedule of prices at which said Village was willing to pay for the lighting of said streets, etc., together with a schedule to be charged by said defendant for electricity for purposes other than public lighting and for heat and power, but denies that the same was fair; admits that said proposition on the part of said plaintiff was submitted to said defendant on the 16th day of August and was by said defendant refused; admits that said defendant within a short time thereafter removed all of its street lights from the streets, avenues and other public thoroughfares in said Village, but this defendant denies that the
36 same was done without the knowlede of the said Village, and avers that at and prior to the removal of said street lighting system, the same was in a bad state of repair and that notice thereof had repeatedly been given to the said Village by the said defendant that to maintain the said system in its then condition was to endanger the safety of property and persons of said Village; that the said defendant made repeated efforts to enter into a contract with the said Village upon terms and under conditions which would be fair and reasonable and which would warrant said defendant in making the necessary expenditures to put same in proper repair so that it could perform any contract into which it might enter with said Village and to afford it fair and reasonable remuneration, but that said Village refused and failed to treat with the said defendant upon any terms of fairness; that prior to the removal of said street lighting system, the said defendant had furnished street lighting to the said Village upon an understanding that the same should be paid for at the rate theretofore paid by the said Village under a contract with the predecessor company of said defendant; that disregarding the terms of said agreement, the said Village refused and neglected and failed to pay to the said defendant certain amounts due thereunder for said lighting, as aforesaid, and arbitrarily deducted from said amounts due certain sums on the alleged claim of outage, which said claim was without any foundation in fact; that
37 the said defendant notified said Village that it could no longer furnish lighting, unless the same were paid for by said Village; that said Village refused to pay, and, therefore, under these conditions, the said defendant company was unable to maintain its street lighting system and removed the same, as aforesaid; that said defendant at all times has and now is ready, able and willing to furnish said Village with street lighting upon fair and reasonable terms of compensation therefor; admits that said defendant company, after the purchase of the plant from its predecessor company, removed certain of the machinery therein contained, and admits that it replaced the same with other machinery, but denies that the latter is of a second-hand construction or of a lower value, and denies that by reason thereof it is less able to supply the community with electricity, and avers that the machinery now in the plant is of a better grade, of more modern design, and capable of a greater degree of efficiency than that formerly installed in said plant. Defendant admits that until restrained by the temporary order of this Court it was about to erect along and upon the streets

of said Village a line of poles for the purpose of stringing additional wires to further advance its interests.

Further answering this defendant denies each and every allegation in said plaintiff's said petition contained, not herein specifically admitted to be true.

Wherefore, this defendant prays that the said petition of the said plaintiff may be dismissed and that the said defendant
38 may be restored to all things it has lost by reason thereof, and for such further relief as to which in equity and good conscience it is entitled.

CAREY & HALL,
SQUIRE, SANDERS & DEMPSEY,
Attorneys for Defendant.

(Duly verified.)

Reply.

(Filed in Court of Common Pleas Dec. 19, 1914.)

Now comes the said plaintiff and upon leave of the Court files this, its reply, herein and says:

That it denies each and every allegation contained in the answer of the defendant except such as are admissions of the facts set forth in the petition.

THE VILLAGE OF UPPER SANDUSKY, O.,
By CLYDE MERCHANT, AND
W. R. HARE.
Its Attorneys.

(Duly verified.)

Agreed Statement of Facts.

For the purpose of trial in the above entitled case, it is hereby stipulated and agreed by and between the parties hereto, that the facts upon which the issue is to be framed are as follows:
39 1. That the plaintiff and defendant are respectively a municipal and a private corporation, under the laws of the State of Ohio, and that defendant company and its predecessors in title, by their articles of incorporation were organized for the purpose of supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power.

2. That the defendant, on the 17th day of January, 1911, purchased the plant, fixtures and all franchise rights of a then going corporation, known as The Citizens Electric Light and Power Company, to which said company, on or about the 4th day of March, A. D. 1889, the council of the Village of Upper Sandusky granted a certain franchise by way of ordinance, the same running to the said company, its associates, successors and assigns, granting certain privileges to the said The Citizens Electric Light and Power Com-

pany of Upper Sandusky, Ohio, its associates, successors and assigns, authorizing and empowering it and them to use the streets, lanes, alleys, avenues and other public thoroughfares of the Village of Upper Sandusky, Ohio, and vesting it and them with full and necessary privileges for such use, for the purpose of erecting, maintaining and operating electric light wires, mains and apparatus complete, for the manufacturing and distribution of electricity for light and power; a copy of said ordinance being hereto attached
40 and made a part of this agreed statement of facts, marked "Exhibit A."

3. That the said defendant company is now operating said plant, except the street lighting system, and claiming all of the rights and privileges in said franchise contained, and which were exercised by the original company therein named.

4. That said ordinance and franchise was and is silent as to its period of duration, there being no limitation as to the length of time it was to remain in force, nor is there any stipulation in said franchise as to when it should terminate.

5. That the said The Citizens Electric Light and Power Company, when it built and completed said electric light plant, installed a complete system for lighting the streets, lanes, alleys, avenues and other public thoroughfares of said Village, and did, under and by virtue of a separate contract, entered into between The Citizens Electric Light and Power Company and said Village, light said public thoroughfares during all the time it was the owner of said plant and system.

6 That said contract for street lighting, by its terms, expired December 31st, 1912, and that from the time of the purchase of said plant, up to the said 31st day of December, 1912, said defendant company furnished street lighting to the said Village at the price per lamp as contained in the former lighting contract, but no agreement was made as to the length of time lighting should be so furnished.

41 7. That by an oral agreement between the said defendant company and the said Village, the defendant continued to furnish street lighting to the said Village in accordance with the said contract theretofore existing as set forth in paragraph six above up to the 16th day of October, 1913.

8. That from time to time between the said 31st day of December, 1912, and the said 16th day of October, 1913, the lighting committee of said Village council made proposals to said defendant company, and the said defendant company presented proposals to the said Village council, of terms and conditions upon which they would enter into a new contract for the lighting of the streets of said Village, but at no time has the said Village made any proposal to the said defendant company, which the said defendant company could accept, nor has the defendant company made any proposition which the said Village could accept.

9. That at no time has said Village, by the action of its council, passed any ordinance declaratory of the rates and conditions under which it would permit the said defendant company to enter into a

contract with said Village for the lighting of the streets of said Village.

10. That on the 16th day of October, 1913, the defendant company, without notice to said Village, except as contained in a letter from defendant company to said Village, under date of August 19, 1913, a copy of which said letter is attached to this state-
42 ment of facts, and marked "Exhibit B," and made a part hereof, and without consent of said Village, removed all of its street lights from the streets, avenues and other public thoroughfares in said Village, and thereafter took down the greater number of its poles and wires used in its street lighting system.

11. That at the different times when the said street-lights, poles and wires, as stated in paragraph ten above were removed as aforesaid, the said lights, poles and wires were in a bad state of repair.

12. That none of the proposals as stated in Paragraph Eight, above, made by the lighting committee of said Village council, contained terms and conditions which in the opinion of said company would be fair and reasonable, and warrant said defendant in making the necessary expenditures to put the said street lighting system in a proper state of repair, so that it could furnish light to said Village, and afford said company a fair and reasonable remuneration therefor. And the proposals made by company, in the opinion of the Village, were unfair and unreasonable.

13. That said defendant is about to erect along and upon the streets of said Village a line of poles for the purpose of stringing additional wires, and at the time of the temporary restraining order granted in this case was preparing to do so, without the consent of said Village, except as expressed in said franchise.

43 14. That, under the agreement between the said Village and the said defendant for the furnishing of street lights to said Village, from the expiration of the said written contract, up to the 16th day of October, 1913, it was mutually understood between the parties hereto that the same should be paid for at the rate theretofore paid by the said Village, under the said contract with the said predecessor company.

15. That said defendant at all times has been and now is ready, able and willing, to install a modern system of street lighting, and to furnish said Village with proper street lighting upon what it believes to be fair and reasonable terms of compensation therefor.

16. That the said defendant company, ever since the purchase of the said plant, fixtures and franchise right, has been and now is the owner of and operating and maintaining a system for the furnishing of commercial lighting and power.

17. That no ordinance is now in effect regulating price to be charged by the defendant company for current for commercial light and power.

18. That during the months of June, July, August and September, 1913, disputes arose as to the proper amount of outages to be deducted from the monthly statements for lighting rendered by the defendant Company; that the night policeman of the said Village was ordered by the council to prepare a report as to the number

of lights not burning during the aforesaid month and that
44 officer made reports to said Council; that said Council deducted various amounts as outages, which were in excess of the correct amount to be deducted according to the reports of the night policeman; that said defendant company claimed that the aforesaid deductions were excessive but at no time ever notified council that it intended to discontinue the street lighting for said reason.

THE VILLAGE OF UPPER SANDUSKY, OHIO,
By W. R. HARE,
——— ———,
Its Attorneys.
THE HARDIN-WYANDOT LIGHTING COMPANY,
By CAREY & HALL, *Its Attorneys.*

I hereby certify the foregoing Agreed Statement of Facts in the above entitled cause.

JAMES P. CLOSE,
Official Court Stenographer of Wyandot County, Ohio.

EXHIBIT A.

An Ordinance Granting Certain Privileges to The Citizens Electric Light and Power Co.

Be it Ordained by the City Council of Upper Sandusky, Ohio.

45 Sec. 1. That The Citizens Electric Light & Power Company of Upper Sandusky, O., its associates, successors and assigns, are hereby authorized and empowered to use the streets, lanes, alleys, avenues and other public thoroughfares of the City of Upper Sandusky, Ohio, and it is hereby vested with full and necessary privileges for such use, for the purpose of erecting, maintaining and operating electric light wires, mains, apparatus complete, for the manufacturing and distribution of electricity for lights and power.

Sec. 2. The Citizens' Electric Light and Power Company, in the construction of its plant, or in erecting poles and conducting their wires for the distribution of electric current, shall not unnecessarily interrupt or obstruct the passage of any street, lane, alley or avenue, or other thoroughfares of said city, and in crossing same shall erect said wires at such altitude as council may prescribe, and whenever it shall in any way change the present condition of any such streets, lanes, alleys or thoroughfares, it shall replace them in as good condition as before, and in the event any litigation shall arise, caused by the occupancy or use of the streets, lanes, alleys or other thoroughfares, the said company shall assume the liability for any damages to adjoining owners or persons injuriously affected, and

shall at its own expense, defend any such suit and idemnify the city from any loss occasioned thereby.

46 Sec. 3. The privileges hereby granted to said Citizens' Electric Light and Power Company shall entitle them to manufacture, sell and distribute light and power by means of electricity to the citizens of Upper Sandusky, Ohio, for public and private uses and the property of the said Citizens' Electric Light and Power Company, its associates, successors and assigns, so erected on the streets, lanes, alleys and highways shall receive same protection under the laws of the city as the property of other corporations engaged in similar business.

Sec. 4. Said Citizens' Light and Power Company shall commence work on said electric light plant within ninety days from the passage of the ordinance, and complete it within six months thereafter, otherwise this ordinance shall be null and void, and the privileges hereby granted shall be declared forfeited.

Sec. 5. This ordinance shall take effect on and after its passage and publication.

Passed in regular session of the council March 4, 1889.

47 EXHIBIT B.

The Hardin-Wyandot Lighting Co. of Ohio. General Offices Kenton, Ohio.

AUG. 19, 1913.

To the Honorable Council of the Village of Upper Sandusky, Ohio.

GENTLEMEN: We beg to acknowledge receipt of copy of an ordinance authorizing The Hardin-Wyandot Lighting Company to operate an electric light plant in the Village of Upper Sandusky, Ohio.

In this connection we would advise that we are operating under a franchise granted March 4th, 1889, to The Citizens' Light and Power Company, and since assigned to this company. We are therefore not interested in a new franchise.

Some time ago we submitted to you prices for street lighting for a period of ten years, but have not as yet been advised as to your disposition of same.

The prices quoted are as low as we can offer and lower than we can quote on a short term contract.

We wish to state that the condition of the present street lighting equipment is such that it is extremely doubtful if we can maintain service with it for more than thirty days without exten-ive repairs, which we are not justified in making, as you realize we are rendering this service without contract. We therefore believe it would

48 be advisable for you to take action promptly if you desire to be sure of continuous street lighting service.

The question of any change in the commercial rates is one which would have to be taken up with the Public Service Commission of Ohio, and we can not consider it as having any connection with our street lighting bid.

The present rates are extremely low, and you will find that the average rate throughout the State in Villages of the size of Upper Sandusky is higher than our present schedule.

Yours very truly,

THE HARDIN-WYANDOT LIGHTING CO.,

(Signed) P. M. MAGLY, *Gen. Mgr.*

Docket and Journal Entries.

In Common Pleas Court.

Entries from Appearance Docket No. 18, Page 75.

1914—Aug. 1. Petition, Precipe filed. Injunction allowed.
1914—Aug. 1. Undertaking by plaintiff for injunction.
1914—Sept. 21. September Term, 1914. Leave to answer by Oct. 10, 1914.
1914—Oct. 9. Answer of defendant filed.
1914—Nov. 30. Demand.
49 1914—Dec. 19. September Term, 1914. Leave to reply instanter by today, cause for hearing, motion to exclude any evidence under the pleadings overruled.

Defendant excepts. Motion for judgment on case of plaintiff overruled. Defendant excepts. Find on the pleadings and agreed statement of facts in favor of the defendant, and that the injunction heretofore granted ought to be dissolved. Petition dismissed, injunction dissolved. Judgment for the defendant and against plaintiff for costs. Notice of appeal. Bond fixed at $200.

1914—Dec. 19. Reply filed.

Journal Entries.

Be it remembered that at the September Term of the Court of Common Pleas, A. D. 1914, to-wit: On the 21st day of September, 1914, an order was made herein and duly entered upon the journal thereof in the words and figures following, to-wit: The Village of Upper Sandusky, Ohio, Plaintiff, vs. The Hardin-Wyandot Light Company, Defendant. Leave is given to the defendant to plead by October 10, 1914.

Be it remembered that at the September Term of the Court of Common Pleas, A. D. 1914, to-wit: on the 19th day of December, 1914, an order was made herein and duly entered upon the journal thereof in the words and figures following, to-wit: The Village of Upper Sandusky, Ohio, Plaintiff, vs. The Hardin-Wyandot Light Company, Defendant.

50 This 19th day of December, 1914, the parties and their attorneys come, and this cause came on to be heard by the court upon the pleadings and evidence. Whereupon the defendant,

before the introduction of any evidence, objects to the introduction of any evidence, on the following grounds:

1. That the petition does not state facts sufficient to constitute a cause of action; (2) that the petition does not state facts sufficient to entitle plaintiff to the relief prayed for; (3) that this court sitting as a court of equity, has no jurisdiction of the subject of the action, which motion is by the court overruled, to which ruling defendant excepts.

Whereupon, said cause was heard by the court upon the pleadings and evidence, the evidence consisting of the agreed statement of facts read in evidence at the trial; and at the close of all the evidence, defendant moved the court to dismiss plaintiff's petition herein, and give judgment for defendant and against plaintiff, on the same grounds alleged in the objection to the introduction of any evidence, as stated above; which motion is by the court overruled, to which ruling defendant excepts.

Whereupon said cause was argued by counsel and submitted to the court, and the court, after due and careful consideration of the same, does find, on the issues joined, for the defendant, and that the plaintiff is not entitled to the relief prayed for by it.

The court further finds that the plaintiff is not entitled to the injunction prayed for in this action, and refuses to allow
51 the same; and that the injunction heretofore granted in this cause ought to be and is hereby dissolved.

The plaintiff's petition is therefore dismissed, the injunction heretofore granted dissolved, set aside and held for naught, and judgment is rendered against the plaintiff and in favor of the defendant for all the costs of this proceeding.

The plaintiff gives notice of appeal, and the bond therefor is fixed at Two Hundred Dollars.

(Duly certified.)

Notice of Application for Injunction.

(Filed in the Court of Appeals Jan. 21, 1915.)

Plaintiff will take notice that the defendant, The Hardin-Wyandot Lighting Company, on the 22nd day of January, 1915, at the Court Room of the Court of Appeals in the City of Lima, Ohio, at 10 o'clock A. M., or as soon thereafter as the same can be heard, through its attorneys, will make application to said court or a judge thereof, for an injunction, as prayed for, and upon the grounds set forth, in the supplemental answer and cross-petition of The Hardin-Wyandot Lighting Company, copy of which is hereto attached.

THE HARDIN-WYANDOT LIGHTING COMPANY,
By SQUIRE, SANDERS & DEMPSEY AND CAREY & HALL, *Its Attorneys.*

52 Service of the above notice, together with copy of said supplemental answer and cross-petition of said The Hardin-

Wyandot Lighting Company, is hereby acknowledged this 21st day of January, 1915, at 10:30 o'clock A. M.

W. R. HARE,
Attorney for Plaintiff.

Supplemental Answer and Cross-Petition of the Hardin-Wyandot Lighting Company.

(Filed in the Court of Appeals Jan. 22, 1915.)

Now comes The Hardin-Wyandot Lighting Company, and by leave of court first had and obtained files this, its supplementary answer and cross-petition, and says, that it incorporates herein all of the admissions, denials, and averments contained in its answer heretofore filed in this cause, the same as if specifically herein re-written, and further answering, and by way of cross-petition, says:

That subsequent to the rendition of the decree of the Court of Common Pleas in this cause, to-wit, on the 11th day of January, 1915, the said Village of Upper Sandusky, through its duly organized council, passed a certain pretended ordinance, a copy of which said pretended ordinance is attached hereto, marked "Exhibit A" and made a part hereof; that by the terms of said pretended ordinance, it is attempted to repeal and hold for naught a certain or-
53 dinance duly passed by the Council of the Village of Upper Sandusky on the 4th day of March, 1889, granting certain privileges to The Citizens Electric Light & Power Company, the predecessor of the said The Hardin-Wyandot Lighting Company, and by the terms of the said pretended ordinance it is further attempted to withdraw the consent of the said Village of Upper Sandusky to the use of the streets, lanes, alleys, avenues, and other public thoroughfares of the Village of Upper Sandusky by the said The Hardin-Wyandot Lighting Company, and by the terms of said pretended ordinance, it is further attempted to require said The Hardin-Wyandot Lighting Company to remove all of its poles, wires and other electrical appliances from off the streets, lanes, avenues, alleys and other public thoroughfares of the said Village of Upper Sandusky.

That the said Village of Upper Sandusky was and is without authority to pass said pretended ordinance, and that said pretended ordinance is illegal and unauthorized and constitutes an abuse of corporate power by the Village of said Upper Sandusky in the following respects, to-wit:

(*a*) That said Village of Upper Sandusky is without power to repeal said ordinance of March 4th, 1889;

(*b*) That said Village of Upper Sandusky is without power to withdraw its consent to the use of the streets, alleys, avenues, lanes and other public thoroughfares of said Village of Upper Sandusky by the Hardin-Wyandot Lighting Company;

54 (*c*) That the said Village of Upper Sandusky is without power to require the said The Hardin-Wyandot Lighting

Company to remove its poles, wires and other electrical appliances from off the streets, lanes, avenues, alleys and other public thoroughfares of the said Village of Upper Sandusky.

That the said Village of Upper Sandusky is without power, as aforesaid, in that the right and authority of the said The Hardin-Wyandot Lighting Company to so operate is a right granted to it by the State of Ohio and can be withdrawn only by the State of Ohio.

That the said action of the said Village of Upper Sandusky in the passing of said pretended ordinance, as aforesaid, is violative of Section 10 of Article I of the constitution of the United States, and is violative of Section 1 of the 14th Amendment of the constitution of the United States, in that the same is an attempt by legislation to impair the obligation of contract and to deprive The Hardin-Wyandot Lighting Company of property without due process of law.

That the said Village of Upper Sandusky, through its officers, agents, attorneys, servants and employes, is threatening to and will, unless restrained by the order of this Honorable Court under pretended authority of the said pretended ordinance aforesaid, interfere with, take down and destroy the said property, poles, wires and other electrical appliances of the said The Hardin-Wyandot Lighting Company from off the streets, lanes, avenues, alleys and other
55 public thoroughfares of the said Village of Upper Sandusky, —all of which would work irreparable injury to the said The Hardin-Wyandot Lighting Company, for which it would have no adequate remedy in law.

Wherefore, the said The Hardin-Wyandot Lighting Company prays, and has heretofore prayed, in its answer filed in this cause, and prays further, that a temporary order may issue out of this court to be in effect during the pendency of the hearing of this cause in this court, enjoining the said Village of Upper Sandusky, its officers, agents, attorneys, servants and employes, and each of them, from either directly or indirectly doing any acts to interfere with or destroy any of the property of the said The Hardin-Wyandot Lighting Company upon the streets, lanes, avenues, alleys and other public thoroughfares within the Village of Upper Sandusky, and from taking any action whatsoever under the said pretended ordinance aforsaid, and that upon final hearing said injunction may be made permanent, said pretended ordinance be adjudged nugatory and held for naught, and for such other and further relief to which the said The Hardin-Wyandot Lighting Company in equity and good conscience may be entitled in the premises.

CAREY & HALL,
SQUIRE, SANDERS & DEMPSEY,
Attorneys for The Hardin-Wyandot Lighting Company.

(Duly verified.)

56

EXHIBIT "A."

An Ordinance To Repeal an Ordinance Entitled, "An Ordinance Granting Certain Privileges to the Citizens Electric Light and Power Company," Passed March 4th, 1889, and to Provide for the Removal of all Poles, Wires and Other Electrical Appliances Belonging to The Hardin-Wyandot Light Company From Off the Streets, Lanes, Alleys, Avenues and Other Public Thoroughfares of the Village of Upper Sandusky, Ohio.

Whereas, the council of the village of Upper Sandusky, Ohio, passed an ordinance, entitled, "An Ordinance Granting Certain Privileges to The Citizens Electric Light and Power Company" on the 4th day of March, 1889, and

Whereas, the company accepted said ordinance and erected an electrical works in said village and furnished electricity for public and private lighting and for power and on the 15th day of January, 1911, sold its plant, etc., together with all its rights acquired under and by virtue of the aforesaid ordinance to The Hardin-Wyandot Light Company, which last mentioned company has continued the business in said village, and

Whereas, The Hardin-Wyandot Light Company not only refused to enter into a contract for street lighting with said village which was reasonable and fair, but did during the month of October, 1913, without the consent or knowledge of said village remove all its street lights, poles, etc., from off the village streets and leave said
57 village in darkness for a time, and

Whereas, The Hardin-Wyandot Light Company has failed and refused to treat with the council as to the rates to be charged for commercial lighting and power and is charging consumers of electricity in said village rates which have been established by said company without the consent or approval of said village, and

Whereas, the acts aforesaid constitute and are an abandonment of the obligations assumed by the Hardin-Wyandot Light Company under the ordinance granting said company the right to use the streets, etc., of the village of Upper Sandusky, and

Whereas, according to the provisions of said ordinance it is binding upon the village and The Hardin-Wyandot Light Company only so long as both parties are mutually agreed to be bound thereby and it is the desire of the village as set forth in its resolution of December 1, 1913, to which this action is supplementary, for which reason and the acts set forth above, to be no longer bound by the terms of said ordinance and to have the light company remove its poles, wires, etc., from off the streets, alleys, etc., of the village of Upper Sandusky, therefore

Be it ordained by the council of the village of Upper Sandusky, state of Ohio:

Section 1. That an ordinance, entitled, "An Ordinance Granting Certain Privileges to The Citizens Electric Light and Power
58 Company," passed by the council of the village on the 4th day of March, 1889, be, and the same hereby is, repealed.

Sec. 2. That consent to the use of the streets, lanes, alleys, avenues and other public thoroughfares of the village of Upper Sandusky, Ohio, by The Hardin-Wyandot Light Company under and by virtue of the ordinance of March 4th, 1889, is hereby withdrawn and said The Hardin-Wyandot Light Company is hereby required to remove all its poles, wires, and other electrical appliances from off the streets, lanes, avenues, alleys and other public thoroughfares of the village of Upper Sandusky.

Sec. 3. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed January 11, 1915.

J. N. TRAXLER, *Mayor.*

Attest:
GEO. M. FLECK, *Clerk.*

January 14, 1915.

Order of Injunction.

(Filed in Court of Appeals Jan. 23, 1915.)

To the said The Village of Upper Sandusky, Ohio:

By an order of this Court made this 22nd day of January, A. D. 1915, as appears by the journal of said Court, you are enjoined from doing directly or indirectly any acts to interfere with or destroy any of the property of the said The Hardin-Wyandot Lighting
59 Company, upon the streets, lanes, alleys, avenues and other public thoroughfares within the village of Upper Sandusky and from taking any action whatsoever under a certain ordinance passed by the council of said Village of Upper Sandusky under date of January 11, 1915, until the further order of the Court.

Witness my signature and the seal of said Court, this 22nd day of January, 1915.

M. S. NEWELL, *Clerk.*
[SEAL.] By DANIEL REYNOLDS, *Deputy.*

(Sheriff's return omitted.)

Reply to the Supplemental Answer of the Appellee.

(Filed in the Court of Appeals Jan. 25, 1915.)

Now comes the said The Village of Upper Sandusky, Ohio, and upon leave of the Court first had, files this, its reply, herein, and says:

It admits that the council of said village passed the ordinance, a copy of which is attached to said supplemental answer, as therein alleged, and it denies each and every other allegation in said supplemental answer contained.

THE VILLAGE OF UPPER SANDUSKY, OHIO,
By CLYDE MERCHANT AND
W. R. HARE,
Its Attorneys.

(Duly verified.)

60 *Motion to Modify Injunction.*

(Filed in the Court of Appeals Jan. 25, 1915.)

The said defendant, The Hardin-Wyandot Lighting Company, moves the court to modify the injunction herein, heretofore granted by the Court of Common Pleas to the said plaintiff in this cause, as follows:

By allowing said defendant, The Hardin-Wyandot Lighting Company, to erect poles, wires, and all other necessary equipment for the purpose of conveying, and to convey thereon electric current, manufactured at its central power plant at Kenton, Ohio, from the corporate limits of said Village to its central plant or power station in said Village, in accordance with the decree of this court, dated May 21st, 1914, recorded in Journal 1, page 72, in the case of the Village of Upper Sandusky, Ohio, against The Hardin-Wyandot Lighting Company.

For the reasons following:

(1) The said defendant company is now furnishing electric current for lighting and other purposes, to its customers in said Village for private use, and is compelled to manufacture said current at its local plant in said Village; that the equipment of said local plant in Upper Sandusky, Ohio, is such that it is impossible to economically manufacture said electric current and sell same to its said customers, but that such manufacture and sale is necessarily, on account of the condition of said local plant in Upper Sandusky, at a large
61 and continuing financial loss to said defendant company; that said defendant company now has a line of poles, wires and equipment erected and in place and ready for use, ready to convey electric current, manufactured at its said central power plant at Kenton, Ohio, to the corporate limits of said Village of Upper Sandusky, which power plant at Kenton, Ohio, is now ready to furnish said electric current; that all that is lacking, for the use of said electricity manufactured at said plant at Kenton, Ohio, is the privilege to connect same with said local plant at Upper Sandusky, Ohio, from the said corporate limits of said Village; that said electric current so manufactured at Kenton, Ohio, is far superior to that being manufactured at Upper Sandusky, Ohio, in usefulness, dependability and power, and will furnish the said users of electric current at Upper Sandusky, Ohio, if the permission herein prayed for is granted, with far better service, and at a reduced cost to the said defendant company; and that such modification of said injunction, herein prayed for, will in no way prejudice the rights of the plaintiff in this suit, but will enable said defendant company to furnish better electric service to the citizens of Upper Sandusky, Ohio, and will relieve said defendant company from the loss under which it is now furnishing said current to its said customers in said Village of Upper Sandusky.

(2) Bringing in of electricity from a place outside of the territorial limits of said Village, to the local plant of the defendant
62 company, does not and will not perpetrate any wrong or injustice upon said Village; but the prohibition thereof by said

injunction does inflict great and unnecessary wrong, injustice and hardship upon said defendant company.

(3) The allegations of plaintiff's petition, upon which said injunction was allowed, are not sufficient to state a cause of action, or to entitle plaintiff to an injunction as prayed for therein.

(4.) The allegations of plaintiff's petition, upon which said injunction was allowed, are untrue.

THE HARDIN-WYANDOT LIGHTING COMPANY,
By SQUIRE, SANDERS & DEMPSEY,
CAREY & HALL,
Its Attorneys.

(Notice of Motion and Acknowledgment of Service omitted.)

Defendant's Motion for New Trial.

(Filed in the Court of Appeals Aug. 6, 1915.)

The defendant herein moves for a new trial for the following reasons, to-wit:

1. That the Court of Appeals erred in reversing the judgment theretofore rendered by the Court of Common Pleas of Wyandot County, Ohio.

2. That the said Court of Appeals erred in refusing to affirm the said judgment of the Court of Common Pleas theretofore rendered.

63 3. That the said Court of Appeals erred in refusing to dismiss the said petition of the said plaintiff, the Village of Upper Sandusky, Ohio.

4. That the said Court of Appeals erred in granting an injunction as prayed for by the said plaintiff herein.

5. That the judgment of the said Court of Appeals is in violation of Article 1, Section 10, of the Constitution of the United States, which provides as follows:

"No State shall enter into any treaty, alliance or confederation, grant letters of marque or reprisal, coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility."

in that the said judgment gives sanction to the legislative acts of the said Village of Upper Sandusky, Ohio, impairing the obligation of contracts, and impairs the obligation of the contract existing between the said The Hardin-Wyandot Lighting Company and the State of Ohio.

6. That the said judgment of the said Court of Appeals is in violation of Article 14, Section 1, of the Constitution of the United States, which provides as follows:

"All persons born or naturalized in the United States and subject

to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce
64 any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,"

in that the judgment of the Court of Appeals gives sanction to the legislative enactments of the Village of Upper Sandusky taking property of the said The Hardin-Wyandot Lighting Company without due process of law.

7. That the judgment of the said Court of Appeals is in violation of Article 1, Section 19, of the Constitution of the State of Ohio, in that the said judgment gives sanction to the legislative acts of the said Village of Upper Sandusky, denying the right of The Hardin-Wyandot Lighting Company to hold its property inviolate.

8. That the judgment of said Court of Appeals is in violation of Article 2, Section 28, of the Constitution of the State of Ohio, in that said judgment gives sanction to the legislative acts of the Village of Upper Sandusky, which are retroactive in their nature and impair the obligations of the contract existing between the said The Hardin-Wyandot Lighting Company and the State of Ohio.

9. That the judgment of the Court of Appeals will result in the taking of property of the said The Hardin-Wyandot Lighting Company without due process of law.

65 10. That the said Court of Appeals was without jurisdiction to declare by its judgment a forfeiture of the contract rights of the said The Hardin-Wyandot Lighting Company, as the form of action in which said judgment was rendered was not one in which forfeiture could be declared.

11. For further errors prejudicial to the said The Hardin-Wyandot Lighting Company manifest upon the face of the record.

CAREY & HALL AND
SQUIRE, SANDERS & DEMPSEY,
Attorneys for Defendant.

Plaintiff's Motion for a New Trial.

(Filed in the Court of Appeals Aug. 6, 1915.)

Now comes the said plaintiff and moves the Court for a new trial herein for the following reasons, to-wit:

First. Said Court erred in holding that injunction was not the proper remedy in this action to determine the rights of the defendant herein.

Second. Said Court erred in holding that quo warranto was the proper remedy for the plaintiff to pursue in seeking the relief demanded in the petition.

Third. Said Court erred in not granting to the plaintiff all of the relief prayed for in its petition.

Fourth. The finding, judgment and decree of said Court in holding that injunction is not the proper remedy in this action
66 is against the law of the land.

Fifth. The finding, judgment and decree of said Court in holding that quo warranto is the proper remedy to secure the relief demanded in the petition is contrary to the law of the land.

Sixth. Said Court erred in not granting to this plaintiff all of the relief prayed for in its petition.

Seventh. Said Court erred in not granting to this plaintiff all of the relief it was and is entitled to under the admitted facts in this action.

Eighth. All of the relief demanded in the petition should have been granted to this plaintiff, and it was error on the part of said Court, as shown by the agreed statement of facts, and the law of the land, to withhold such relief.

Ninth. For other errors appearing on the face of the record prejudicial to the rights of this plaintiff.

CLYDE MERCHANT,
D. C. PARKER AND
W. R. HARE,
Attorneys for Plaintiff.

Docket and Journal Entries.

In the Court of Appeals. Docket Entries.

1914, Dec. 21. Appeal Bond filed.
1914, Dec. 21. Transcript filed.
67 1914, Dec. 21. Original papers filed.
1915, Jan. 21. Notice of application for Injunction.
1915, Jan. 22. Supplemental Answer and Cross-Petition filed.
1915, Jan. 22. January Term, 1915. (See entry.)
1915, Jan. 22. Undertaking for Order of Injunction filed.
1915, Jan. 22. Order of Injunction issued.
1915, Jan. 23. Order of Injunction returned. (Endorsed.)
1915, Jan. 25. Reply filed.
1915, Jan. 25. Notice of Motion and Motion to Modify Injunction.
1915, Jan. 26. Jantuary Term, 1915. (See entry.)
1915, Feb. 23. Motion filed.
1915, Feb. 23. January Term, 1915. Above motion allowed.
1915, Aug. 6. January Term, 1915. Finding and decree for plaintiff awarding permanent injunction against defendant erecting poles, wires, or lamps or other structures in, upon or over the streets, alleys and public places in plaintiff until its consent shall have been obtained. Costs adjudged against defendant. Execution awarded. Motion for new trial overruled. Exceptions saved to parties severally. Cause remanded for execution. (Per Curium filed.)
1915, Aug. 6. Motion for new trial.

1915, Aug. 6. Motion for new trial.
68 1915, Aug. 9. Undertaking for stay of execution.

Be it remembered that at the January Term of the Court of Appeals, of Wyandot County, Ohio, A. D. 1915, to-wit: on the 22nd day of January, 1915, an order was made herein and duly entered upon the journal thereof in the words and figures following, to-wit:

THE VILLAGE OF UPPER SANDUSKY, OHIO, Appellant,
vs.
THE HARDIN-WYANDOT LIGHTING COMPANY, Appellee.

This cause came on to be heard upon the application of The Hardin-Wyandot Lighting Company for leave to file a supplemental answer and cross-petition in said cause, and such leave is hereby granted, and it appearing to the court upon the averments and allegations contained in said supplemental answer and cross-petition, that a temporary restraining order should issue out of this court in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the said Village of Upper Sandusky, its agents, attorneys, servants and employees, and each of them, be, and they hereby are restrained upon giving bond in the sum of $500.00 to the approval of the Clerk of this court from doing directly or indirectly any acts to interfere with or destroy any of the property of the said The Hardin-Wyandot Light-
69 ing Company, upon the streets, lanes, alleys, avenues and other public thoroughfares within the Village of Upper Sandusky, and from taking any action whatsoever under a certain ordinance passed by the Council of said Village of Upper Sandusky under date of January 11, 1915, until the further order of this court.

Be it remembered that at the January Term, of the Court of Common Pleas of Wyandot County, Ohio, A. D. 1915, to-wit: on the 26th day of January, 1915, an order was made herein and duly entered upon the journal thereof in the words and figures following, to-wit: The Village of Upper Sandusky, Ohio, Plaintiff, vs. The Hardin-Wyandot Lighting Company, defendant.

On this 26th day of January, 1915, this cause came on to be heard upon the application of The Hardin-Wyandot Lighting Company in open court, counsel for the Village of Upper Sandusky being present, having been duly served with notice of such application, for a modification of a certain temporary restraining order granted by the Probate Court of Wyandot County in said cause; and it appearing to the court that a modification of said order, if said order is in effect, should be allowed;

It is therefore ordered, adjudged and decreed that the said The Hardin-Wyandot Lighting Company be and the same is hereby given permission to bring into the Village of Upper Sandusky electricity generated at the said company's centrol plant at Kenton, Ohio, in accordance with the terms of a certain decree, made by this
70 court on the 21st day of May, 1914, in a certain cause of action, then pending in this court between the same parties,

the same being No. 6; and further permission is hereby given to the said The Hardin-Wyandot Lighting Company to immediately build and erect all and such necessary po'es wires and appliances, and to do such things as may be required to accomplish the acts herein permitted. And the said temporary restraining order, if said order is in effect, is hereby modified, to comply with said permission herein granted.

To all of which said Village of Upper Sandusky by its counsel excepts.

Be it remembered that at the January Term of the Court of Appeals of Wyandot County, Ohio, A. D. 1915, to-wit: on the 23rd day of Feb'ruary, 1915, an order was made herein and duly entered upon the journal thereof in the words and figures following, to-wit: The Vi lage of Upper Sandusky, Ohio, Plaintiff, vs. The Hardin-Wyandot Lighting Company, Defendant.

This day this cause came on to be heard upon the motion of the appellant for an extension of time for a period of ten days from the 26th day of Feb'ruary, 1915, within which to file briefs in the above entitled action, and after due consideration of the court the same is allowed.

(Signed) PHIL M. CROW,
W. H. KINDER,
T. T. ANSBURY,
Judges.

71 Be it remembered that at the January Term of the Court of Appeals of Wyandot County, Ohio, A. D. 1915, to-wit: on the 6th day of August, 1915, an order was made herein and duly entered upon the journal thereof in the words and figures following, to-wit: The Village of Upper Sandusky, Ohio, Plaintiff, vs. The Hardin-Wyandot Lighting Company, Defendant.

This cause came on to be heard upon the p'eadings and the agreed stat'ement of facts, was argued by counsel and submitted to the court, and was by the court taken under advisement.

And the court coming now this 6th day of August, 1915 to render its decision herein, do find that injunction is not the proper remedy to determine the rights of the defendant company under the franchise claimed under the ordinance granted to the predecessor in interest of the defendant, but that quo warranto is the appropriate and only remedy for determining that question; to which finding and decree of the court the said plaintiff excepted and still excepts.

And the court further find that the plaintiff is entitled to the relief prayed for in its petition, to the extent that the defendant company cannot make use of the streets, alleys and public ways of said village for the purpose of erecting po'es, wires and lights and other structures thereon and thereover, without the consent of said Village; and that the prayer of the petition should be

72 & 73 granted to the extent that the said defendant should be enjoined from erecting poles, wires, lamps or other structures, in, upon or over the streets, alleys and public places in said

Village of Upper Sandusky, Ohio, until the consent of said Village shall have been obtained.

It is therefore adjudged and decreed by the court that said defendant be forever enjoined and restrained from erecting poles, wires, lamps or other structures, in, upon or over the streets, alleys and public places within the corporate limits of said Village, until the consent of said Village shall have been obtained.

It is further ordered that said plaintiff recover its costs against said defendant, and execution is awarded therefor.

Motions for a new trial on the part of said plaintiff and said defendant are overruled, to which ruling on its respective motion for a new trial each of said parties excepts.

To all of said finding and decree of the court, except as to the finding that injunction is not the proper remedy to determine the rights of the defendant company under the franchise, but that quo warranto is the proper remedy, defendant excepted and still excepts.

It is further ordered by the court that the above entitled action be remanded to the Court of Common Pleas of said Wyandot County for execution.

(Duly certified.)

74 *"Opinion."*

THE HARDIN-WYANDOT LIGHTING CO.
v.
THE VILLAGE OF UPPER SANDUSKY.

1. The act of January 26, 1887 (84 O. L., 7), made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, and while said act remained in force the power of such companies to occupy the streets of a municipality was derived from the state.

2. The act of April 21, 1893 (Sections 9192 and 9193, General Code), subjected electric light and power companies to "municipal control alone" and provides that no such company shall occupy the streets, alleys, etc., of any city, town or village, with its equipment to conduct electricity for lighting, heating or power purposes without the "consent of such municipality."

3. When such a company which has occupied the streets and public places of a city or village with its poles, wires and equipment, voluntarily and without the consent of the municipality, removes and dismantles a portion of the same and renders itself wholly unable to furnish any electricity whatever for the purpose of public lighting, it cannot afterward return and repossess itself of those rights and erect another equipment in such streets and public places without the consent of the city or village.

(No. 14996—Decided February 15, 1916.)

Error to the Court of Appeals of Wyandot county.

75 The village of Upper Sandusky brought suit in the common pleas of Wyandot county against the defendant, an Ohio

corporation. In its petition it alleged that on the 4th of March, 1889, the council of the village passed an ordinance granting to The Citizens Electric Light & Power Company, its associates, successors and assigns, a franchise to use the streets, lanes, alleys, avenues and other public thoroughfares of the village for the purpose of erecting, maintaining and operating an electric light and power plant; that in 1912 defendant purchased the plant and fixtures, and is now operating the same, claiming all the rights and privileges in said franchise which were exercised by the original company; that said ordinance was and is silent as to the period of duration of the franchise, there being no limitation as to the length of time it was to remain in force, nor is there any stipulation as to when it shall terminate.

It is alleged that the original company, when it built and completed the plant and installed a complete system for lighting the streets, lanes, alleys and other public thoroughfares of the village, did, under and by virtue of a contract, light said public thoroughfares during all the time it was the owner; that shortly after the defendant became the owner of the plant and system, and after the contract in force at the time of the purchase had expired, plaintiff made repeated efforts to make a new contract for the lighting of the thoroughfares, etc., but was unable to do so, for the reason that the prices asked by the defendant were exorbitant and unreason-
76 able; that plaintiff prepared and submitted to the defendant a full, fair and complete schedule of prices which the village was willing to pay for the lighting of the streets, etc., which proposition was rejected by the defendant.

It is averred that defendant claimed that plaintiff should take the matter up with the public service commission of Ohio if the rates proposed by the defendant were not satisfactory, and that thereupon the said defendant failed and refused to make any further attempts to arrive at a fair and just settlement of the matters in controversy; that the defendant, within a short time thereafter, without the knowledge or consent of the plaintiff, removed all of its street lights from the streets, avenues and thoroughfares, removed all of its wires, cut down and removed all of the poles used for the support of said wires and completely dismantled its street-lighting system, thus rendering itself unable to furnish any electricity whatever for the purposes of public lighting, and placed itself in such position that it cannot light any of the public places of said village, and has rendered its plant absolutely worthless for that purpose.

It is further alleged that the defendant has removed from its plant whatever valuable machinery was there at the time it purchased it from the original company, and has replaced the same with other machinery, second-hand in quality, and has by this means lowered the value of its plant and rendered itself less able to supply
77 the commodity it purports to sell.

Plaintiff says it cannot and does not agree with the defendant as to the terms and conditions of said purported franchise; that by its act in demolishing and removing its street-lighting system it has forfeited every and all rights it may have had thereunder,

and that its continuing use of the streets, lanes, alleys, etc., for the purpose of supplying private users for its own profit is a violation of said pretended franchise, both as to the letter and spirit of the same, and that the company has no right whatever to use any of the public ways of the said village for any of the purposes for which it is now using them.

Plaintiff further says that the said defendant is about to erect along and upon the streets of said village a line of poles for the purpose of stringing additional wires to further advance its private interests; that it is so preparing to do without the consent of the village and entirely ignoring the rights of the public; that said defendant, having forfeited its pretended franchise, has no right to use any of the public ways of the village.

It is alleged that the defendant, by reason of its failure to agree with plaintiff as to the rates to be charged private consumers for electric current, as well as for street lighting, and its removal of its system for the lighting of the public highways of the village, has forfeited any rights it had under the franchise.

78 The plaintiff prays that the defendant may be enjoined from erecting said additional poles, that the said franchise may be forfeited and that the defendant be required to remove from the public highways of the village all of its equipment now located therein, and for all proper relief.

There was attached to the petition a copy of the ordinance granting the franchise.

In its answer the defendant admits the passage of the ordinance granting the franchise, as stated in the petition, and that it purchased the plant and fixtures of the original grantee and is now operating the same and claiming all of the rights and privileges in the said franchise contained.

It admits that the ordinance was and is silent as to the period of duration of the franchise; admits that there is no limitation as to the length of time it was to remain in force, nor any stipulation as to when it should terminate; admits that the original company installed a system for lighting the public thoroughfares in the village and did, under contract with the village, light the same during all the time it was the owner of the plant. Defendant denies the allegations of the petition with reference to the making of a new contract for the lighting of the streets and thoroughfares of the village, except as to the submitting of a schedule of prices which the village was willing to pay and that the same was rejected by the defendant. It admits that it shortly thereafter removed all

79 of its street lights from the streets, avenues and thoroughfares, and alleges that the same were in a bad state of repair; that it had repeatedly given notice to the village thereof; that it had made repeated efforts to enter into a contract with the village upon terms and under conditions which would be fair and reasonable and which would warrant defendant in making the necessary expenditures to put the same in proper repair so that it could perform any contract into which it might enter and to afford it fair and reasonable remuneration, but that the village refused to treat with the

defendant on any terms of fairness; that prior to the removal of said street-lighting system defendant had furnished street lighting to the village upon an understanding that the same should be paid for at the rate paid under the contract with the predecessor company; that said village refused to pay certain amounts due thereunder, as aforesaid, and arbitrarily deducted certain sums on alleged claim of outage, which claim was without foundation in fact; that defendant was unable to maintain its street-lighting system under these conditions and removed the same, as aforesaid; that said defendant at all times has been, and now is, able, ready and willing to furnish the village with street lighting on fair and reasonable terms. It denies that it has replaced the original machinery with second-hand machinery of lower value, and avers that the machinery now in the plant is of a better grade than formerly installed in the plant.

80 It admits that until restrained by the order of the court it was about to erect on the streets a line of poles for the purpose of stringing additional lines to further its interests, and denies all the other allegations of the petition.

The plaintiff for reply denies all the allegations in the answer except the admission of facts set forth in the petition.

On the trial in the common pleas court the defendant objected to the introduction of any evidence, on the ground that the petition did not state facts sufficient to constitute a cause of action nor sufficient to entitle the plaintiff to the relief prayed for, and that the court, as a court of equity, had no jurisdiction of the subject of the action. This objection was overruled and the cause was heard upon the pleadings and evidence. The trial court entered judgment in favor of the defendant.

The cause was appealed to the court of appeals. In the court of appeals the defendant filed a supplemental answer and cross-petition, in which it incorporated the averments contained in its original answer, and alleged that, subsequent to the decree of the common pleas court, the village had passed a certain pretended ordinance which purported to repeal the original ordinance of the 4th of March, 1889. It alleged that the village was without authority to pass said pretended ordinance, and that the same is illegal and void for the reason that the village was without power to withdraw

81 the consent given in March, 1889; that this consent can only be withdrawn by the state of Ohio; that the enforcement of said pretended ordinance would be in violation of certain provisions of the constitution of the United States and of the state, which are specifically referred to.

Defendant prayed that the village be enjoined from doing any acts to interfere with or destroy any of the property of the defendant.

The cause was heard in the court of appeals, the entry in the case reciting that it was "heard on the pleadings and agreed statement of facts." The court found that injunction was not the proper remedy to determine the rights of the defendant company under the franchise granted to the predecessor of the defendant, but that quo warranto was the appropriate and only remedy for determining that

question, and further found that the defendant was not entitled to make use of the streets, alleys and public ways of said village for the purpose of maintaining poles or other structures thereon without the consent of the village, and decreed that the defendant be enjoined from erecting poles, wires, lamps or other structures in, upon or over the streets, alleys and public places within the corporate limits of said village until the consent of said village shall have been obtained.

This proceeding is brought by the plaintiff in error to reverse this judgment.

Messrs. Squire, Sanders & Dempsey; Messrs. Carey & Hall and Mr. T. M. Kirby, for plaintiff in error.

82 Mr. Clyde Merchant; Mr. W. R. Hare, village solicitor, and Mr. D. C. Parker, for defendant in error.

JOHNSON, *J.*:

Although the entry of the decree in the court of appeals recites that the cause was heard on the pleadings and an agreed statement of facts, the record here does not show that any bill of exceptions was taken in that court and no agreed statement of facts was given judicial sanction by any authentication of the court. Therefore, the only question left which this court is authorized to consider is whether the petition states facts sufficient to justify the decree complained of.

It is averred in that pleading that in March, 1889, the village passed the ordinance granting the franchise to The Citizens Electric Light & Power Company.

The plaintiff in error rests its case here on the broad proposition that the right to distribute electricity over the streets of the village emanates from the state and not from the municipality. It is contended that the plaintiff in error and its predecessor were organized under the laws of Ohio, with all the powers and privileges granted to telegraph and telephone companies by Section 9170 et seq. General Code, and that therefore no village ordinance was necessary to make its rights effective, except such as related to the mode of use.

Section 9170 provides that "A magnetic telegraph company
83 may construct telegraph lines, from point to point, along and upon any public road," etc., and Section 9178 enacts that when lands authorized to be appropriated for the use of such company are subject to the easement of a street, alley, public way or other public use, within the limits of a city or village, the mode of use shall be such as agreed upon between the municipal authorities and the company. If they cannot agree, or if the municipal authorities unreasonably delay to enter into an agreement, the probate court of the county shall direct in what mode the line shall be constructed along such street, etc.

Section 9191 provides that the provisions of this chapter shall apply also to a company organized to construct a line or lines of telephone.

In City of Zanesville v. The Zanesville Telegraph & Telephone Co., 64 Ohio St., 67, it was said, at pages 80 and 81: "It will be

noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the mode of such use that becomes the subject of agreement or judicial determination."

In Farmer et al. v. The Columbiana County Telephone Co., 72 Ohio St., 526, it is held: "Telephone companies organized in this state obtain power to construct their lines along the streets
84 and public ways of municipal corporations from the state by virtue of sections of the Revised Statutes, 3454 to 3471-8, inclusive, and not from the municipal authorities." And in The Queen City Telephone Co. v. City of Cincinnati, 73 Ohio St., 64, it is said, at page 81: "It is of course conceded as now well settled that the general power to occupy the streets of a municipality by a telephone company is derived from the state."

It is contended by the plaintiff in error that Sections 9192 and 9193, General Code, confer upon electric light and power companies all of the powers conferred upon telegraph and telephone companies in the sections above referred to.

In the consideration of this contention it is necessary to briefly review the history of legislation on the subject. The sections of the General Code above mentioned are included in Section 3454 et seq., Revised Statutes. Those sections were in effect at the time the transactions involved in the cases above mentioned occurred, and were in effect long before the granting of the franchise described in the petition in this case.

The first enactment touching the power of companies organized for the purpose of supplying electricity for lighting streets, etc., was passed May 12, 1886 (83 O. L., 143), and authorized such companies to construct lines for conducting electricity for power and light purposes through alleys, etc., "with the consent of the
85 municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe." Prior to 1886 there was no statute conferring power on the municipality to grant to an electric light company the right to erect poles. In the following year the act of January 26, 1887 (84 O. L., 7), was passed as a supplementary section to Sections 3454 to 3471, being numbered Section 3471*a*. It provided that the provisions of the chapter (telegraphs and telephones), so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, squares and public places with electric light and power. This act did not repeal the act of May 12, 1886, supra, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies "the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies." This was the state of the law at the time of the granting of the franchise (March 4, 1889) which is involved in this case.

Therefore, under the holdings in the cases cited, the grantee company derived its general power to occupy the streets from the state.

On April 21, 1896 (92 O. L., 205), Section 3471*a* was amended. This act made the provisions of the chapter as to telegraphs and telephones applicable, except Section 3461, which conferred
86 power upon the probate court to determine the matter in the respects stated if the company and the municipal authorities fail to agree. This amendment of 1896 provided that in order to subject the same to municipal control alone, no person or company shall place, construct or maintain any line for lighting through any street, alley, etc., without the consent of such municipality. These provisions substantially have been carried into the General Code in Sections 9192 and 9193.

The act of 1896 disclosed that the legislature was not content to clothe electric light companies in municipalities with the same powers with which it had invested telegraph and telephone companies. The change was made in the light of experience, and the sound and substantial reasons of public policy which dictated the change would seem to be manifest. There is a clear distinction between telegraph and telephone companies on the one hand and electric light companies on the other. The reasons why the state should desire to reserve to itself the right to grant franchises for the use of public highways to telegraph and telephone companies do not apply to electric light companies. Telegraph and telephone systems pervade the entire state. They pass in and out of cities and villages and through the rural districts, connecting the whole in a vast network. It might result in great public inconvenience if each municipality had the absolute right to arbitrarily grant or
87 refuse permission to pass through its limits. It is easy to conceive that in many instances such an arbitrary right could be used to foster monopolies and combinations to the detriment of the general welfare. Generally speaking, these suggestions do not apply to an electric light company. As a general rule an electric light company is formed for the purpose of furnishing light to the municipality in which it is located and to its people. Its plant, its poles, wires and equipment are generally located there. But in addition to this, a more important consideration is that a system of telegraphs and telephones is comparatively harmless to life and property, while a system of electric lighting is highly dangerous to life and property. These are substantial reasons why the local authority should be vested with larger power to deal with a matter of such a nature and which comes in such close contact with its own people, than is necessary with reference to telegraphs and telephones. However, these are matters wholly within the power of the legislature, which, when exercised, must be judicially enforced.

The purposes of the act of 1896, now Sections 9192, 9193 and 9194, General Code, was to invest the municipality itself with power to make the grant. It specifically excepts the provision of Section 3461, Revised Statutes, and it expressly provides that in order to subject the same to municipal control alone, no company shall place electric

wires for lighting, heating or power purposes in the streets of
88 the city or village without the consent of such municipality.

The elimination of Section 3461, Revised Statutes, and the use of the word "alone" abrogate the power of the probate court to act in such cases, and this is followed by the express provision requiring the consent of the municipality.

We are convinced, therefore, that the contention of the plaintiff in error that Section 9170 et seq., General Code, as now in force, clothe the electric light companies with all the powers of telegraph and telephone companies, is unsound.

None of the statutory provisions which were held, in the cases cited, to deny the power of the municipality to determine the right of the telegraph and telephone companies to occupy streets, etc., is included in the sections of the General Code relating to electric light and power companies. On the contrary, those sections contain a positive grant of such power to the municipality.

However, as pointed out, the ordinance in question here was passed in 1889, while the act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the court of appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of the court, we are not able to estimate the force of plaintiff in error's argument with reference to it. We are compelled to assume that the allegations of the petition were sustained by the evidence, and that the defendant, without the knowledge or
89 consent of the plaintiff, removed all of its street lights from the streets, avenues and other public thoroughfares in the village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street-lighting system and rendered itself wholly unable to furnish any electricity whatever for the purposes of public lighting. It is manifest from Section 3 of the ordinance that the parties contemplated public lighting as an essential consideration leading to the granting of the franchise which was accepted by the predecessor of the plaintiff in error.

In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law.

The judgment and decree of the court of appeals will, therefore, be affirmed.

Judgment affirmed.

Nichols, C. J., Donahue, Wanamaker, Newman, Jones and Matthias, J. J., concur.

90 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1916.

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing (16 pages) is a true and correct copy of the opinion of the Supreme Court of Ohio, in case No. 14996, decided February 15, 1916, said Cause No. 14996 being entitled, The Hardin-Wyandot Lighting Co. v. The Village of Upper Sandusky.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 15th day of August, 1916.

[Seal The Supreme Court of the State of Ohio.]

E. O. RANDALL, *Reporter.*

Endorsed on cover: File No. 25,491. Ohio Supreme Court, Term No. 661. The Hardin-Wyandot Lighting Company, plaintiff in error, vs. The Village of Upper Sandusky. Filed September 15, 1916. File No. 25,491.

(25,491)

SEP 8 1
JAMES D. MA

In the Supreme Court of the United State

(October Term, 1916.)

No. [redacted]10

THE HARDIN-WYANDOT LIGHTING COMPANY,
Plaintiff in Error,

vs.

THE VILLAGE OF UPPER SANDUSKY,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF PLAINTIFF IN ERROR.

H. T. MATHERS, and
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Solicitors.

SQUIRE, SANDERS & DEMPSEY,
Counsel.

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Cases and Authorities Cited.

(25,491)

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vs.

THE VILLAGE OF UPPER SANDUSKY,

Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This cause comes into this Court upon error to the Supreme Court of Ohio and is prosecuted to reverse and set aside the judgment of that Court which affirmed the judgment of the Court of Appeals of Wyandot County, Ohio, and to obtain an affirmance of the judgment of the Court of Common Pleas of Wyandot County, Ohio.

The original action was one in equity, begun by the Village of Upper Sandusky, Defendant in Error here, seeking the forfeiture of a franchise granted by the council of said village on March 4, 1889, to the Citizens' Electric Light and Power Company, its associates, suc-

cessors and assigns, to use the streets, lanes, alleys, avenues and other public thoroughfares of said village for the purpose of erecting, maintaining and operating poles, wires, mains, and apparatus complete for the manufacture and distribution of electricity for light and power for public and private consumers therein; which franchise the Citizens' Company had accepted, and for a long time exercised, and which Plaintiff in Error had acquired by purchase and assignment, and had, for a long time prior to the commencement of the suit, operated under; and also seeking an injunction against the exercise of any rights under said franchise, and to require Plaintiff in Error to remove from the public highways its equipment therein. Upon full hearing in the Court of Common Pleas, the petition of the Village was dismissed.

The Village appealed the cause to the Court of Appeals of said Wyandot County. Pending the hearing on the appeal, which was a *trial de novo*, the council of the village passed an ordinance (R. p. 29) on January 11, 1915, wherein was recited the granting of the franchise to said The Citizens Electric Light and Power Company, and the sale of the latter's plant, together with all its rights acquired under and by virtue of said ordinance, to this Plaintiff in Error, which continued the business in said village; and wherein it is charged that Plaintiff in Error failed and refused to treat with the Council as to the rates to be charged for commercial lighting and power, and is charging consumers of electricity in said village rates which had been established by Plaintiff in Error without the consent or approval of the village; and further that Plaintiff in Error did, during the month of October, 1913, remove all its street lights, poles, etc. from off the village streets, after refusing to enter into a contract for street lighting with said village; and it is

then ordained that the consent to use of the streets, etc. of the village, under and by virtue of the ordinance of March 4, 1889, is withdrawn, and Plaintiff in Error is required to remove all of its poles, wires and other electrical appliances from the streets, etc., of the village.

The Citizens Electric Light and Power Company, the predecessor in interest of Plaintiff in Error, had made a contract with the village to light its streets and public places at an agreed price. This contract for street lighting had expired before the commencement of the original suit. Plaintiff in Error, however, had continued to furnish street lights at the contract rate, for some time after the expiration of the contract. Disputes arose between the parties, and the council declined to pay further under the terms of the expired contract. Being unable to agree on the price to be paid for street lighting, the council having passed no ordinance fixing the rates, Plaintiff in Error removed from the streets that part of its poles, wires and lamps used for street lighting, the same being obsolete and out of repair, but continued to furnish electricity for light and power to private consumers in said village.

Upon the trial in the Court of Appeals a forfeiture of Plaintiff in Error's rights under the ordinance was refused on the ground that injunction was not the proper remedy to determine that question, but that *quo warranto* was the appropriate and only remedy therefor. The Court of Appeals, however, decided that Plaintiff in Error could not make use of the streets, alleys and public ways of the village for the purpose of erecting poles, wires and lamps, or other structures thereon or thereover, without the consent of the council of the village, and permanently enjoined Plaintiff in Error from erecting poles, wires or lamps, or other structures in,

upon, or over the streets, alleys or public ways of said village, until the consent of the council was obtained, thereby preventing Plaintiff in Error from making any extensions or renewals, or repairs of its equipment, which will result in the progressive paralysis of its functions and the destruction of its franchise and business.

The ordinance of March 4th, 1889, granting the franchise to Plaintiff in Error's predecessor to use the streets, contained no limitation as to length of time it was to remain in force, nor was there any stipulation as to when it should terminate. It was the contention of the Defendant in Error, on the trial in the Court of Common Pleas and in the Court of Appeals, that this ordinance, granting the franchise aforesaid, by reason of its lack of a time limit, was binding on the village and the Plaintiff in Error so long only as both parties were mutually agreed to be bound thereby.

Both ordinances are set out *verbatim* in the Appendix hereto.

The Court of Appeals in deciding the case predicated its conclusion upon two propositions (see *per curiam* opinion in Appendix) as follows:

> "First, there being no time limit fixed, and the council having taken appropriate action to terminate the franchise, it was thus ended; and
>
> Second, that by reason of the tearing down by the defendant of its poles, wires and lamps for public lighting, there was by it an abandonment of its franchise rights."

The Supreme Court of Ohio, on error to the Court of Appeals, affirmed the judgment of that court, *in toto*, basing its conclusion, however, wholly on the alleged abandonment of the street lighting part of the franchise.

In the course of the opinion, (93 O. S. 428, 442), while it is pointed out that the ordinance of March 4th, 1889, which granted to Plaintiff in Error's predecessor the rights it had exercised in the streets, was passed while the Act of 1887 (84 O. L. 7) was in force, by virtue of which the power of Plaintiff in Error to occupy the streets of a municipality was derived from the state, yet they say, that in view of the fact that neither the agreed statement of facts nor any other evidence was brought upon the record by bill of exceptions or entry of the court, they are compelled to assume that the allegations of the petition were sustained by the evidence, and that this Plaintiff in Error, without the knowledge or consent of the village, removed all of its street lights from the streets, avenues and other public thoroughfares in said village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street-lighting system and rendered itself wholly unable to furnish any electricity whatever for the purpose of public lighting; further observing that, from Section 3 of the ordinance, the parties contemplated public lighting as an essential consideration of the grant, which was accepted by the predecessor of the Plaintiff in Error. The Court goes on to say that:

> "In this posture of the case *while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the Company's rights,* still, by reason of the facts stated above, and the voluntary abandonment by the Company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned, without the consent of the village, in accordance with existing law."

The "existing law" referred is Section 9193 of the General Code of Ohio, subjecting electric light and power companies to "municipal control alone," and providing that no such company shall occupy the streets, etc. of any city, town or village, with its equipment, to conduct electricity for lighting, heating or power purposes, without the "consent of such municipality." This Section was enacted April 21st, 1896 (92 O. L. 205), as part of 33471a R. S., long after the ordinance, out of which Plaintiff in Error's rights grow, was passed and accepted, and large investments of capital made on the faith thereof.

Throughout all the foregoing litigation and up to now, the Plaintiff in Error has been exercising the franchise, granted March 4th, 1889, to furnish electric light and power to private consumers in the Village of Upper Sandusky without let or hindrance from the Village or the State of Ohio.

Upon this state of the case the questions involved here arise out of the following propositions:

1. The final judgment of the Supreme Court of Ohio draws in question the validity of a statute, on the ground of its being repugnant to the Constitution of the United States; is in favor of the validity of such statute; and thereby holds as valid a subsequent statute which impairs the contract rights granted under a former statute.

2. The Act of the legislature of the State of Ohio, passed under date of April 21st, 1896, is repugnant to Article I, Section 10, of the Constitution of the United States in so far as it prevents the Plaintiff in Error from an exercise of the rights granted under the ordinance of Upper Sandusky, of March 4th, 1889, and impairs the obligation of the contract created under the act of the legislature of January 26, 1887.

3. The final judgment of the Supreme Court of Ohio gives effect and validity to a legislative enactment of the State of Ohio which impairs contract rights granted under a former statute and is repugnant to Article I, Section 10, of the Constitution of the United States.

4. The final judgment of the Supreme Court of Ohio draws in question the validity of councilmanic acts of the Defendant in Error; is in favor of their validity; and gives effect to such acts declaring forfeited the franchise rights of the Plaintiff in Error granted under a prior legislative enactment of the State of Ohio, thereby depriving Plaintiff in Error of its property without due process of law, contrary to Sec. 1 of Article XIV of the Constitution of the United States, and impairing the obligation of a contract and of contract rights arising and vesting under former acts, contrary to the inhibition of Art. I, Sec. 10, of the Constitution of the United States.

5. The final judgment of the Supreme Court of Ohio gives effect to legislative enactments which impair the obligation of contract rights neither forfeited nor abandoned.

6. The petition of the Defendant in Error, upon which the final judgment of the Supreme Court of Ohio is predicated, is insufficient in law or equity to warrant the relief granted, or any other relief.

We desire to discuss the foregoing propositions under the following heads:

1. The final judgment of the Supreme Court of Ohio is violative of the contract and due process clauses of the Constitution of the United States.

2. The indeterminate character of the franchise ordinance does not render it revocable at the will of the village.

3. The rights of the Plaintiff in Error rest upon a grant from the State of Ohio and can be declared forfeited only by the state in an action of *quo warranto*.

4. In legal contemplation there was no abandonment of any franchise rights:

(a) There was no intention to abandon, and no abandonment in fact;

(b) The franchise rights are entire;

(c) They do not depend upon user of all the streets;

(d) Plaintiff in Error could not abandon part of the franchise.

5. The final judgment of the Supreme Court of Ohio in affirming the Court of Appeals is in conflict with announcements contained in the opinion and is not in accordance with the principles of equitable procedure.

6. The petition of the Defendant in Error, upon which the final judgment of the Supreme Court is predicated, is insufficient to warrant the relief granted.

ARGUMENT.

May we suggest, as a sort of preliminary, that the action forbidden to states by both of these provisions of the Constitution of the United States (Article I, Sec. 10 and Article XIV, Sec. 1) does not mean simply legislative action, but applies to all instrumentalities and agencies officially employed in the execution of the law, down to the point where personal and property rights of the citizen are touched, and whether the agencies of the state be legislative, executive or judicial?

A late decision of this Court in support of this proposition is to be found in *Northern Ohio Traction &*

Light Company, et al. vs. State of Ohio, ex rel. Pontius, 245 U. S. 574, where it was held that a resolution of county commissioners, purporting to revoke an electric railway company's franchise, and treated by the state court as having that effect, amounts to state action; and the franchise, not being so revocable, such resolution impairs such obligation and is void.

And it has been held that the word "law," as used in the Amendment, means both the general law of the land, which protects life, liberty, property and immunities, as well as the *laws of procedure*. *Twining vs. New Jersey*, 211 U. S. 78.

Another decision in support of this proposition, to the effect that a judgment of a state court may be violative of the contract clause of the Federal Constitution is *Mobile & Ohio R. R. Co. vs. Tennessee*, 153 U. S. 486.

Another decision in support of this proposition, to the effect that a judgment of a state court, even if authorized by statute, whereby private property is taken for public use without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment to the Constitution of the United States.

Chicago, Burlington & Quincy Railway Company vs. Chicago, 166 U. S. 226.

Other cases to the foregoing effect are:

Carter vs. Texas, 177 U. S. 442;

Rogers vs. Alabama, 192 U. S. 226.

Louisiana Railway & Navigation Company vs. Behrman, Mayor of New Orleans, 235 U. S. 164;

Raymond vs. Chicago Union Traction Co., 207 U. S. 20-36;

Scott vs. McNeal, 154 U. S. 45;
Virginia vs. Rives, 100 U. S. 313, Syl. 4, 318, 319.
Nashville C. & S. L. Ry. Co. vs. Taylor, 86 Fed. 184-185.

1. THE FINAL JUDGMENT OF THE SUPREME COURT OF OHIO IS VIOLATIVE OF THE CONTRACT AND DUE PROCESS CLAUSES OF THE FEDERAL CONSTITUTION.

The Defendant in Error relies in its petition upon an alleged forfeiture by conduct, and also contended in the Court of Appeals that a forfeiture was worked by force of the ordinance passed January 11, 1915, under the assumed authority of the case *East Ohio Gas Company vs. City of Akron*, 81 O. S. 33. We desire to comment upon this case later on.

The ordinance of January 11, 1915, which is set out in the Appendix, p. 76, comes upon the record by force of its incorporation into a supplemental answer and cross-petition filed by the Plaintiff in Error in the Court of Appeals, setting up that ordinance and averring that the same was passed without authority and is illegal and unauthorized, and constitutes an abuse of corporate power by the village, being violative of the state and federal constitutional guaranties, and particularly Section 10, Article I and Section 1, Article XIV of the Constitution of the United States (R. p. 27), and the admission in the reply of the Defendant in Error, filed in said Court of Appeals (R. p. 30), wherein it admits that the council of the village passed the ordinance of January 11, 1915.

By this ordinance of January 11, 1915, the village undertakes to repeal the ordinance granting the right to The Citizens Electric Light and Power Company, passed March 4th, 1889, to use the streets of the village for its poles, wires, etc., and to withdraw the consent of the village from such use of the streets under the ordinance of March 4th, 1889; also, requiring the removal from the streets, lanes, alleys, avenues and public thoroughfares of the village of all the poles, wires and other electrical appliances belonging to this Plaintiff in Error. In short, the village undertakes by the later ordinance to deprive the Company of all its rights, acquired and exercised under the earlier ordinance, including the right to furnish light to private consumers.

The Supreme Court, although, in the course of the opinion, it refers only to the alleged abandonment of the street-lighting, yet by affirming the judgment of the Court of Appeals, denies to Plaintiff in Error the right to use the streets to furnish electricity for either public or private lighting. Such holding of the Supreme Court gives effect to the ordinance of January 11th, 1915, which undertook to forfeit the franchise of the Plaintiff in Error and withdraw the consent of the village to the use of the streets, granted by the ordinance of March 4th, 1889; and also gives effect to the Act of the General Assembly of Ohio, of April 21st, 1896, which was passed long after the vesting of the rights granted by the ordinance of March 4th, 1889, which act was intended to subject electric light and power companies to municipal control only and which provides that no company shall occupy the streets, alleys, etc. of any municipality with its equipment to conduct electricity for lighting, heating or power purposes without the consent of such municipality.

The Citizens' Electric Light and Power Company, the predecessor in grant of and title to the rights under the ordinance of March 4th, 1889, was organized under the laws of Ohio with all of the powers and privileges granted to telegraph and telephone companies by Section 9192 of the General Code, which is as follows:

> "Excepting Sections 9178 and 9179, so far as applicable, the provisions of this chapter shall apply to companies organized for the purpose of supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power or an automatic package carrier. Save what are given by such excepting sections every such company shall have the power and be subject to the restrictions herein prescribed for magnetic telephone companies."

What then are the powers of magnetic telegraph companies?

Section 9180 of the General Code provides:

> "Any person or persons may construct lines of electric telegraph from point to point upon and along any of the public roads and highways and across any waters within the limits of this State by the erection of the necessary fixtures, posts, piers, or abutments for sustaining cords or wires of such lines, but they shall not be so constructed as to discommode the public in the use of the roads or highways, or endanger, or injuriously interrupt the navigation of such waters. This provision shall not authorize the erection of a bridge across any waters in this State."

By virtue of this section an electric light company had the right to construct its lines "*from point to point upon and along any of the public roads and highways,*"

which has been interpreted to mean along the streets of villages and cities.

> "Telephone companies organized under the laws of this State have the right, by virtue of Sections 3454, 3461-1 and 3471 of the Revised Statutes to construct their lines along the streets and public ways of municipal corporations."
>
> *The City of Zanesville vs. The Zanesville Telegraph & Telephone Company*, 64 O. S., 67.

> "Telephone companies organized in this State obtain power to construct their lines along the streets and public ways of municipal corporations from the State by virtue of sections of the Revised Statutes, Nos. 3454 to 3471-8, inclusive, and not from the municipal authorities."
>
> *Farmer vs. The Columbiana, Etc., Co.*, 72 O. S., 526.

> "It is of course conceded as now well settled that the general power to occupy the streets of a municipality by a telephone company is derived from the State."
>
> *The Queen City Telephone Company vs. City of Cincinnati*, 73 O. S., 64, at 81.

> "It is also manifest from a reading of the statutes that the power and authority to use the highways of a municipality for electric light purposes is conferred by the State, and not the municipality, under the sections above referred to" (being Sections 9170-9192, General Code).
>
> *City of Cincinnati vs. The Diamond Light Company*, 16 Nisi Prius (n. s.) 305, 311.

What is now Sec. 9192 of the Code was passed January 26, 1887, as Sec. 3471a, of the Revised Statutes. It is the section heretofore, at p. 12 of this brief, fully set forth, giving to electric light and power companies

the same powers, and subjecting them to the same restrictions as are prescribed for magnetic telegraph companies. The Act of April 21, 1896, which the Supreme Court of Ohio applied to the case when it was before it for decision, and which it held required a new consent to the use of the streets by the village, was enacted as an amendment of Sec. 3471a. It is found in 92 O. L. 205. It sets out original section 3471a, and then, by way of proviso, enacts the matter which is now Sec. 9193, of the General Code. Sec. 9193 is as follows:

> "In order to subject such companies to municipal control alone, no person or company shall place, string, construct or maintain a line, wire, fixture or appliance of any kind to conduct electricity for lighting, heating or power purposes through a street, alley, lane, square, place or land of a city or village without the consent of such municipality. This inhibition also extends to all levels above or below the surface of such public ways, grounds or places, as well as along their surfaces, but not to rights heretofore received through and exercised under, proceedings of a probate court."

Sections 9192 and 9193 of the General Code, (Act of April 21, 1896) must be read together. The first section gives to electrical companies all rights of magnetic telegraph companies, except the right of review of the regulatory conditions imposed by the municipality, so that when Section 9193 employs the term "municipal control alone," it must of necessity refer to *regulatory* control; otherwise, it would pre-suppose that the power taken from the Probate Court and reinvested in the municipality was legislative, and this supposition cannot be entertained, because under the constitution the Probate Court could never exercise legislative power.

So, then, at the outset it is very pertinent to suggest that the right to distribute electricity over the streets of

the Village of Upper Sandusky emanated from the state, as expressed in its charter grant under the statutes of the State of Ohio and no village ordinance was required to make that right effective, except that the village and the company were authorized, when the ordinance of March 4th, 1889, was passed, to *agree on the mode* of using the streets; and this agreement was made when that ordinance was passed by the council and accepted by the grantee.

There is, of course, reserved to the village the right of police regulation, but it must be borne in mind that no violation of any police regulation is under consideration or involved in this case.

The Supreme Court of Ohio, in deciding this very case at bar, held to the foregoing effect, when it announced in the syllabus (which is the law of the case) that:

> "1. The act of January 26th, 1887 (84 O. S. 7) made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, and while said act remained in force the power of such companies to occupy the streets of a municipality was derived from the state."

If the right to occupy the streets came from the state under the Act of January 26th, 1887, which was in force when the ordinance of March 4th, 1889, was passed, giving consent to Plaintiff in Error's predecessor to use the streets of Upper Sandusky for its poles, wires, etc., then the ordinance of January 11th, 1915, in undertaking to withdraw such consent and eject Plaintiff in Error from the streets certainly impairs the contract rights guaranteed by the Federal Constitution, for it is settled that an ordinance of a municipality is to be

regarded as the legislative act of the state within the purview of Section 10, Article I of the Constitution, as well as the Fourteenth Amendment.

Raymond vs. Chicago Union Traction Company, 207 U. S. 20;

Home Telephone and Telegraph Company vs. Los Angeles, 227 U. S. 278;

Cuyahoga River Power Company vs. City of Akron, 240 U. S. 462.

The Supreme Court of Ohio, however, when it rendered the judgment here sought to be reversed, declined to recognize the contract character of the rights arising out of the ordinance of March 4th, 1889, which was accepted and acted under by the Plaintiff in Error's predecessor, and by the Plaintiff in Error, and on the faith of which large investments were made in the plant and its appurtenances; for, by that decision, it applied subsequent legislation of the General Assembly of Ohio, which materially affects and impairs the contract. This was the Act of April 21st, 1896 (92 O. L. 205), which added the proviso to the former grant of power to electric light and power companies. We have already set it forth, ante, p. 14.

This action of the Supreme Court, we submit, is contrary to all authority on the subject, and is violative of the federal constitutional provisions hereinbefore referred to. In support of this proposition we submit the following authorities:

3 *Dillon on Municipal Corporations*, Section 1242:

> "A legislative grant of the right to use the city streets for a public service, upon condition of the performance of the service by the grantee, when accepted and acted upon by the grantee, is a contract between the grantee and the State, which is protected by the Constitution of the United States

and which cannot be impaired by subsequent State legislation. When the grant of the right to so use the streets flows from the act of the municipality similar principles apply. The municipality acts by virtue of delegated authority from the legislature and is the representative or agent of the State for that purpose. Hence, an ordinance of a city made pursuant to legislative authority, granting the right to use the streets of the city for a railroad, or for gas or water mains and pipes, or for electric poles, wires or conduits, or for any other recognized public service, is, when accepted and acted upon by the grantee, a contract within the protection of the Federal constitution * * *."

1 Allen, Foot & Everett on Law of Incorporated Companies Operating under Municipal Franchise, page 214:

"The franchise becomes a contract which is protected by the Federal constitution and may not be impaired. It is a property right, entitled to the protection of property and subject to the same regulations."

Little Falls Electric & Water Company vs. City of Little Falls, 102 Fed., 663:

"A city council having power to contract for the supplying of water and lights to the city and its inhabitants may also grant such franchises for the use of the streets as are necessary or convenient for the construction and maintenance of the necessary works and appliances for furnishing such supplies; and such a grant, when accepted and acted upon by the grantee, constitutes a contract protected by the Constitution of the United States from impairment by State legislation. Ordinances or resolutions passed by the city council under its delegated legislative powers, attempting to annul the contract and repeal the grant, are within the constitutional inhibition and invalid."

American Waterworks & Guarantee Co. vs. Home Water Co., 115 Fed., 171:

> "Where a city is empowered by the laws of the State to contract for water supply and to grant an exclusive franchise to use its streets for such purpose to the person contracted with during the term of the contract, it acts under such powers in a legislative and not an administrative capacity and its enactments thereunder are laws of the State within the meaning of the contract clause of the Federal constitution."

The Cleveland City Railway Company vs. City of Cleveland, 94 Fed., 385:

> "City ordinances making grants of franchises to street railway companies on specified conditions, when accepted by the companies, constitute contracts which cannot be annulled or amended, except by consent of both parties, and which are protected from impairment by the 14th constitutional amendment."

The court at page 395:

> "These ordinances so molded into contracts under the legislative power hereinbefore referred to are in effect laws of the State of Ohio, and, therefore, are within the inhibition of the 14th amendment to the constitution of the United States, which is directed quite as pointedly to the legislative power of the estate or municipality as to the executive or judicial, so that the obligation of contracts made by legislation are protected by the Federal constitution, which prohibits the State from passing any law impairing obligations of contracts or the taking of property without due process of law."

Ashland Electric Light & Power Company vs. City of Ashland, 217 Fed., 158 (decided October 5, 1914):

"Under the doctrine of the Federal Courts, a grant, by ordinance, to an electric company of a right to occupy the streets of a city with its poles and wires for the conduct of its business is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant."

In a foot note to the case of *Clarksburg Electric Light Company vs. Clarksburg*, reported in 50 L. R. A., 142, under the following heading: "The Privilege of using the Street is a Contract within the Constitutional Provision against Impairing the Obligation of Contracts," the annotator says:

"So far as the privilege of using the streets for a particular purpose depends upon a franchise granted by the charter of a corporation, it is clearly founded upon a contract within the constitutional provision under the principles established in the *Dartmouth College case.*"

After citing innumerable authorities which have treated the subject in connection with gas companies, telegraph and telephone companies, electric light companies, subway companies, etc., he concludes as follows:

"The conclusion, from all the authorities, seems to be clear to the effect that a franchise or privilege to use the streets for any of the various *quasi* public services above considered will constitute an irrevocable contract, unless there is in some form a clear reservation of the right to cancel or revoke it."

City of Owensboro vs. Cumberland Telephone & Telegraph Company, 230 U. S., 58:

"This case involves the nature and duration of the right of a telegraph company to maintain its poles and wires upon the streets of the city of

Owensboro. The ordinance under which it, or its predecessors in right, title and property have maintained a telephone system in the city was passed on December 4, 1889. The grantee under that ordinance at once proceeded to erect its plant and to place its poles and wires upon the streets, and it and its successors and assigns, have ever since maintained and operated a telephone system.

In January, 1909, the city council passed an ordinance requiring the telephone company to remove from its streets and alleys all of the poles and wires 'within a reasonable time after the passage of the ordinance' and upon failure to so remove, the mayor was directed to have them removed. A bill in equity was filed for the purpose of enjoining the enforcement of this ordinance, the contention being that it was an impairment of the company's contractual property rights in the streets, and as such in contravention of the contract and due process clauses of the constitution. Upon a final hearing the Court below sustained the bill and permanently enjoined the enforcement of the repealing ordinance. The Supreme Court affirmed the Court below."

We quote the following excerpts from the opinion of the Supreme Court, page 64:

"That the right conferred by the ordinance involved is something more than a mere license is plain. A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given, have been made."

"That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal, nor for a temporary

purpose. The right conferred came from the State through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law and it was subject to all of the police power of the city.

That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right, has been too many times decided by this Court to need more than a reference to some of the later cases. Citing: *Detroit vs. Detroit Street Railway Co.*, 184 U. S., 368, 395; *City of Louisville vs. Cumberland Telephone and Telegraph Company*, 224 U. S., 649, 661; *Boise Water Company vs. Boise City*, 230 U. S., 84. As a property right it was assignable, taxable and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit.

The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant."

The court, page 66:

"If there be authority to make the grant and it contains no limitation or qualification as to its duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such

companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People vs. O'Brien, supra*, a decision accepted and approved by this Court in *Detroit vs. Detroit Street Railway, supra*: 'The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly, when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held under the legislation and facts that the right created by the grant of the franchise was perpetual, and not for a limited term only.' *Dillon on Mun. Corp.*, 5th ed., Sec. 1265.

"*Syllabus.* A municipal ordinance granting to a corporation qualified to carry on a public business, such as a telephone system, the right to use the streets for that purpose, is more than a mere revocable license; it is the granting of a property right, assignable, taxable and alienable, an asset of value and a basis of credit.

Such a grant is one of property rights in perpetuity unless limited in duration by the grant itself or by a limitation imposed by the general law of the State or by the corporate powers of the municipality."

* * * * * * *

Rio Grande R. R. vs. Brownsville, 45 Texas, 88:

"The city authorities, after having granted consent to a company to use a certain street, cannot, by revoking the city ordinance granting such authority, deprive the company of its rights to use such streets, if prior to the repair the company has made expenditures on the strength of the consent."

Village of London Mills vs. Fairview-London Telephone Circuit, 105 Ill. App., 146 (affirmed 208 Ill., 289):

"Syllabus. When a municipal corporation under statutory sanction, by ordinance or other lawful mode, authorizes a telephone company to erect its poles in certain designated streets, and the company, on the faith of the license so granted, does erect them, it thereby acquires a vested right to use the designated streets so long as it conforms to the conditions of the license, and the license cannot thereafter be revoked at the pleasure of the municipality. Such license having been granted and accepted and money having been expended upon the faith of it, it is not revocable except for cause."

The court, page 150:

"When the licensee accepts, expends money and enters into possession of the streets to the extent required by the use of the poles and wires, the license becomes a binding contract between the municipality and the company and to revoke it would not only be inequitable, but beyond the power of the municipality."

The Hudson Telephone Company vs. Mayor, etc., 49 N. J. Law, 303:

"The ordinance gave the company permission to erect posts and poles and to lay an underground cable in certain streets, or portions of several streets, in Jersey City. Then an ordinance was passed repealing the ordinance which conferred permission to place the poles, as above mentioned."

The court, page 305:

"I am of the opinion that as a general rule the designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right, of which it cannot be stripped by a subsequent revocation of such designation."

"The notion that a corporation, which, under provisions similar to the present act, has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks, or subterranean cables, or in erecting poles and stretching wires, is at the mercy of the city authorities continuously and entirely, is not to be entertained for a moment."

"A view that the rights of the corporation are of so unsubstantial a character, is opposed to all judicial statements from the *Dartmouth College case* to the present time."

Again, at page 306, "That the common council has the power, at its mere will, to annul the act which has legalized the occupation of the streets and to leave the company's property impressed with the character of a nuisance which can be at once abated and their business thus destroyed, I cannot admit."

4 McQuillan on Municipal Corporations, Section 1661:

"If a grant to a public service company of the right to use the streets for tracks, poles, pipes and the like, is considered a franchise, as it usually is, the general rule is that it cannot be revoked during its term at the mere pleasure of the municipality in an arbitrary and unreasonable manner, without just cause, if it has been acted upon, unless the power to revoke has been reserved in the grant, and especially

is this true where the public service corporation has expended considerable money in reliance on such grant.

Furthermore, even in this jurisdiction, where the grant of the right to use streets is considered a mere license, rather than a franchise, it is held that after the grant has been accepted and work done in pursuance thereof, it is not revocable but is binding as a contract."

3 *Dillon on Municipal Corporations*, Section 1306, page 2150:

"When, therefore, a city has by ordinance, or otherwise, granted to a corporation the right to lay its pipes and mains in the city streets, or to erect poles and wires therein, and the corporation has in consideration thereof, or in reliance thereon, expended money in placing its poles or laying its mains and pipes, the city cannot by subsequent ordinance revoke or repeal the rights which it has conferred."

3 *Abbott on Municipal Corporations*, Section 920:

"The arbitrary right of a municipal corporation to revoke or declare forfeited license rights does not exist."

3 *Abbott on Municipal Corporations*, 919:

"Where a public corporation has the lawful power to grant a privilege or license to one to occupy public highways, and thereafter carry on the business thus authorized, such a grant becomes a contract and one which cannot be revoked or impaired without the consent of the interested party to whom the license is granted. The Federal constitution protects as inviolable these contract rights—for such they are."

3 Abbott, Section 896;

> "The weight of authority, and as based upon the better reasoning, holds that where permission is granted for the use of public highways or grounds to one legally capable of exercising it, a right is obtained in the nature of a contract and of which the grantee cannot be deprived illegally. There is created a contract obligation which is protected by the Federal constitution and which is subject to all provisions of law in respect to a change or alteration, amendment, or revocation that apply to ordinary contracts."

2 Abbott on Municipal Corporations, Section 834:

> "A grant of the right to use streets for telephone poles becomes, when the privileges granted are accepted, a binding contract between the parties which cannot be revoked or rescinded except for cause."

Pond on Public Utilities, Section 133:

> "Under the decision of the *Dartmouth College case*, 4 Wheat, 578, establishing the doctrine that its charter was a contract, and that when accepted and acted upon the franchise rights creating it a body corporate became vested, the courts have consistently protected these corporate rights and the special franchise rights to street privileges when conferred on municipal public utilities under proper authority duly executed and accepted."

28 Cyc., 383:

> "All ordinances are subject to repeal, except such as are contractual in their character. Ordinances contractual in nature or effect may not be repealed by the municipality without consent of the other party, unless power to repeal is reserved by the original ordinance, for such repeal would impair the obligation of the contract."

28 Cyc., 890:

> "A grant of a right to use the streets is generally considered a grant of a vested right, which the municipality cannot revoke after acceptance, except for failure to comply with the terms of the grant or for other good cause.

Chicago vs. Sheldon, 9 Wall, 50, 55:

An ordinance, granting the right to lay railway tracks in a street, being under consideration, the court says:

> 'A contract having been entered into between the parties, valid at the time by the laws of the state, it is not competent even for its legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect."

City R. R. Co. vs. Company, 166 U. S., 557;
Coast Line R. R. Co. vs. Savannah, 30 Fed., 646;
Citizens Street R. R. Co. vs. Memphis, 53 Fed., 715;
Detroit Citizens Street Railway Company vs. Detroit, 22 U. S. App., 570;
Baltimore vs. Baltimore Trust, Etc., Co., 54 Fed., 153;
Africa vs. Knoxville, 70 Fed., 729;
Birmingham, Etc., St. Ry. Co. vs. Company, 79 Ala., 465;
Parmely vs. Chicago, 60 Ill., 267;
People vs. Chicago R. R. Co., 18 Ill. App., 125;
Chicago, Etc., Company vs. Chicago, 59 Ill. App.;
Western Paving & Supply Co. vs. R. R. Co., 128 Ind., 525;
Williams vs. Railroad Company, 130 Ind., 71;
Havelman vs. Railroad Company, 79 Mo., 642;
Kansas City vs. Corrigan, 86 Mo., 67;

New York vs. Railroad Company, 32 N. Y., 261;
People vs. O'Brien, 111 N. Y., 1.

The ordinance expressing permission of the village to the predecessor of Plaintiff in Error to use the streets, etc., provides that the company is authorized and empowered "to use the streets, lanes, alleys and other public thoroughfares of the village of Upper Sandusky, Ohio, and it is hereby vested with full and necessary privileges for such use for the purpose of erecting, maintaining and operating electric light wires, mains, apparatus, complete for the manufacture and distribution of electricity for light and power."

There is nothing in the ordinance which requires, as a condition of the permission thus granted that the company furnish street lighting to the village. Its predecessor saw fit to enter into a contract so to do and the Plaintiff in Error was thereafter substituted and complied with that contract until by its own terms, it expired. It could not lawfully have been compelled to enter into another contract, but it still had the right to use the streets of the village under its charter power for the purpose of distributing electricity for commercial use. Even though we assume that at the time the defendant company dismantled its street lighting system it was still operating under a contract which had not been breached by the village itself, the relation existing between the village and the company, in so far as it related to street lighting, was purely commercial, and the rights of each were no less or no greater than the rights of individuals dealing in commercial contracts.

The case of *Kaukauna Electric Light Company vs. City of Kaukauna* is so strikingly applicable as illustrative of this point that we quote therefrom at length:

"*Syllabus 1.* Where a municipal ordinance grants to an electric light company a franchise to use the streets upon certain conditions and also contains a contract with the company for street lighting, breaches of the conditions which are germane only to the franchise—such as those which relate to the burying of wires or the painting of poles—constitute no defense to an action to enforce payment for lights furnished under the contract."

Quoting from the opinion of the court, page 333:

"The ordinance or contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this state, where the city acts in a two-fold capacity. First, as a *governmental body exercising delegated power* of the state, it confers, and limits with conditions, the privilege or franchise to use the public streets, under authority of Sec. 1780b, Stats. 1898. * * * In addition to this function as an agent of the state, however, the city in the same instrument or ordinance, exercises its function as a *business* corporation, with power to purchase, contract for, and pay for electric lights for public purposes, and to specify the conditions of such contracting,—a power arising under its own charter. In the argument in this case, as in the ordinance itself, these two functions are greatly confused, and it is not always easy to separate those provisions which pertain to the one portion or the other of the instrument. In the formulation of such a document, reciprocal duties are usually imposed both upon the grantee of the franchise and upon the city. Some of these duties or conditions clearly relate exclusively to the subject of the franchise. Others with equal clearness may apply only to the contractual and commercial duty of supplying lights to the city, to be paid for when so supplied. Other provisions, conditions, and covenants may be of a mixed character, possibly applicable to both phases, so that their disobedience

would at once constitute a breach of the plaintiff's contractual duty, which forms the basis of the city's promise to pay, and also a breach of the conditions upon which it holds its franchise from the state to occupy the public streets."

Quoting from the opinion of the court, page 345:

> "I fully concur in the result reached in this case. It was not found necessary to determine whether the action taken by the city was effectual to constitute a rescission of its lighting contract. *It attempted not only to rescind the contract for lighting, but also to put an end to its franchise to use the streets. As regards its attempt to oust the company of its franchise rights, granted to it by the city as the agent of the state, its action is held nugatory.*"

We, therefore, on this phase of the case, submit that:

The final judgment of the Supreme Court of Ohio is violative of Article I, Section 10 of the Constitution of the United States which provides as follows:

> "No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contract, or grant any Title of Nobility,"

in that it annexes to the right of the Plaintiff in Error to use the streets of the Village of Upper Sandusky for its poles, wires and electrical appliances, obtained and exercised under the franchise of March 4th, 1889, granted to its predecessor, the restrictions contained in the Act of the General Assembly of Ohio of April 21st, 1896 (Section 9193, General Code), passed after the vesting of the rights granted by the ordinance mentioned; thereby requiring this Plaintiff in Error to again obtain the consent of the village to the use of the streets, etc., and

thereby impairing the obligation of the contract between Plaintiff in Error's predecessor and the village, which contract, being expressly assignable, was assigned to Plaintiff in Error and exercised by it, with the recognition and consent of the Defendant in Error.

This conclusion of the Supreme Court is also inhibited by reason of Article II, Section 28 of the Constitution of Ohio, which reads as follows:

> "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, and manifest the intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

The final judgment of the Supreme Court of Ohio is also violative of Article I, Section 10 of the Constitution of the United States in that the said judgment of said court gives sanction to a legislative act of the Village of Upper Sandusky, Ohio, (the ordinance of January 11, 1915) impairing the obligation of the contract existing between the Plaintiff in Error and the village, arising out of the Plaintiff in Error's rights under the ordinance of March 4th, 1889, and impairs the obligation of the contract existing between the Plaintiff in Error and the State of Ohio, which authorized Plaintiff in Error, under the ordinance of March 4th, 1889, to furnish electricity for light and power in the Village of Upper Sandusky, and to use the streets and public places thereof for its poles and equipment, subject only to the right of the council of the village to regulate the *mode* of such use, which right was exhausted when it passed

the ordinance of March 4th, 1889, thereafter the use of the streets being only subject to the reasonable exercise of the police power of the village.

And the final judgment of the Supreme Court of Ohio is in violation of Article XIV, Section I of the Constitution of the United States which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

in that the said judgment of said court gives sanction to the legislative enactment of the Village of Upper Sandusky, Ohio, which takes the property of Plaintiff in Error without due process of law.

2. THE LACK OF LIMITATION AS TO THE TIME OF DURATION OF THE ORDINANCE OF MARCH 4th, 1889, GRANTING TO PLAINTIFF IN ERROR'S PREDECESSOR THE FRANCHISE INVOLVED HERE, DOES NOT RENDER IT REVOCABLE AT THE WILL OF THE VILLAGE.

The Defendant in Error, when it passed the ordinance of January 11, 1915, undertaking to withdraw its consent to the use of the streets and public places of the village, did so on the assumed authority of the *East Ohio Gas Co. vs. City of Akron*, 81 O. S. 33.

In this case it was sought by the city to compel the East Ohio Gas Company to continue serving gas to the citizens of that city under a franchise granted to it by the city so to do, and the theory upon which the plaintiff's claim proceeded was that the franchise being without terms of limitation it was perpetual, and, therefore, so long as the city desired service the company was bound to furnish it. The Supreme Court held that the franchise was not perpetual, but indeterminate, and could continue only so long as the parties mutually intended that it should, and that the company, therefore, had the right to withdraw from the city at any time.

Counsel for the plaintiff in the instant case bottom their contention upon this decision, entirely losing sight of the fact that the law applicable to gas companies upon the question of franchise rights is entirely different from the law controlling franchises granted to electrical companies.

We have heretofore cited the section of the code which gives to electrical companies the same right as magnetic telegraph companies, and we have further cited the statute which gives the right to magnetic telegraph companies to occupy the public highways and roads, and we have shown that this language has been judicially interpreted to mean streets of villages and cities.

On the other hand, gas companies do not secure their rights to operate in cities and villages by any grant emanating from the State, but by permission solely from the city or village in which they desire to locate; in fact, they cannot enter a city or a village without its express permission, evidenced by a franchise license, and this for the reason that Section 2392 of the General Code provides as follows:

> "Nothing herein confers any right to engage in such business (gas) or to erect or maintain struc-

tures in a street, alley, or public place, without the consent of the municipality in which it is to be constructed."

It will be noted also that there is a forfeiture statute which relates to gas companies, but does not in any respect relate to electric companies. See Section 3986 of the General Code, which is as follows:

> "A neglect to furnish gas to the citizens and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed and established by the council from time to time shall forfeit all rights of such company under the charter by which it has been established."

We must assume that the Supreme Court when it decided the *Akron case* had in mind, first, the statute which limited the right of The East Ohio Gas Company to enter the city of Akron only upon the city's consent, and we must further assume that the Court had before it, also *the forfeiture section relating to gas companies*, which gives as a ground for forfeiture, a failure to comply with rates, etc., fixed by the city.

Therefore, by reason of the fact that gas companies and electric companies at the time the rights of the Plaintiff in Error accrued were governed by entirely different statutes (electric companies having all the rights of a magnetic telegraph company, which included the right to operate over the highways and streets of villages and cities and there being no right of forfeiture in the village or city, while, on the other hand, gas companies could come into the village or city only upon the express consent of the municipality), and, further, by reason of the right of forfeiture provided by the gas statute, the decision in the *East Ohio Gas case* does not and cannot apply to the case at bar.

There is another case arising in Ohio, and ultimately decided by this Court, which clearly illustrates the character of the right acquired by the grantee of a franchise which is silent as to the time of its duration. We refer to *Northern Ohio Traction and Light Company vs. State of Ohio, ex rel. Pontius*, 245 U. S. 574. In that case it was sought to declare forfeited the franchise of the Traction and Light Company to operate an interurban railway through Stark County, Ohio, upon the theory that since the grant contained no limit as to time of its duration, it exists only so long as the parties thereto mutually agree. In the case above referred to it was held that:

> "(First Head-note) Where there are no controlling provisions in a State Constitution or Statute, and no prior adjudication by its Courts to the contrary, a franchise for an interurban electric railway granted by the proper state authority, without limit as to duration, and in the absence of circumstances showing an intention to give or to accept a mere revocable right, is a contract not subject to annulment at the will of the granting authority."

This case reverses the Supreme Court of Ohio, reported in 93 O. S. 466. When this case was before the Court of Appeals of Stark County, that Court, in deciding the questions involved the same way in which they were decided in 245 U. S. 574, said, (15 C. C., ns. 577, p. 585) respecting the contention on the part of the plaintiff that the *East Ohio Gas Company case* controlled:

> "We are of the opinion that the case of *East Ohio Gas Company vs. City of Akron*, 81 O. S. supra, does not apply in this case. That a corporation like the corporation in the 81st O. S., is of a different nature than a corporation for public service, such as a railroad company or an electric railroad company, and therefore the principles announced in the 81st O. S. do not apply, but rather the principle

recognized in the case of *State ex rel. Taylor vs. The Columbus Railway Company*, 1 C. C. (N. S.), page 145, does apply in this case. In that case it is held, that a franchise or privilege to construct and operate said railway granted and consented to without limitation of time, is perpetual, subject only to be terminated by the General Assembly, under Section 2, Article I, or Sections 1 and 2 of Article XIII, of the Constitution of the state. Consent given without limitation of time to a corporation is not always revocable even by legislative authority. The case of *City of Detroit vs. Detroit & F. Plankroad Company*, 43 Mich. 140, we cite, in which Judge Cooley says: 'It cannot be necessary at this date to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightly have acquired.' "

We submit that councilmanic action on the part of the village, or any decree of court which would limit the rights of Plaintiff in Error in the full enjoyment of its franchise privileges, subject, of course, to proper police regulations, would be in violation of Article I, Section 10 of the Constitution of the United States.

3. THE RIGHT OF PLAINTIFF IN ERROR RESTS UPON A GRANT FROM THE STATE OF OHIO, AND CAN BE DECLARED FORFEITED ONLY BY THE STATE IN QUO WARRANTO.

The effect of the final judgment of the Supreme Court is to render the property of Plaintiff in Error in the village of Upper Sandusky practically valueless because it cannot be used by it, and is a practical affirmance of the attempted forfeiture on the part of the council, which takes, by destroying, the property of the Plain-

tiff in Error without any compensation, which has been held to be contrary to the due process of law clause of the Fourteenth Amendment.

The predicate of the plaintiff's petition is:

> "That said defendant company has no right whatever to use any of the public ways of said village for any of the purposes for which it is now using them * * *, that said defendant having forfeited its said pretended franchise has no right to use any of the public ways of the village."

The prayer of the plaintiff's petition is:

> "That said pretended franchise may be declared forfeited; that said defendant be required to remove from the public highways of said village all of its equipment now located thereon."

This action is clearly one to declare a forfeiture. Assuming all of the facts of the plaintiff's petition to be true, and assuming further that those facts entitle the plaintiff to some relief, and that the court did, in compliance with the prayer, declare a forfeiture, which could only legally be done in an action by the State in *quo warranto*, such a decree would be a nullity for want of jurisdiction.

We need not argue to this Court that a right granted by the State cannot be declared forfeited except by the State and that the proceeding in which such a forfeiture is so declared is one in *quo warranto* in a court having jurisdiction of such causes.

> "A judgment of ouster cannot be pronounced in any other proceeding than one in *quo warranto*."
>
> *Gas Light Company vs. Zanesville*, 47 O. S., 35.

> "Injunction cannot be resorted to to work an ouster or to forfeit a franchise. Equity never decrees a forfeiture."

Upon this branch of the case the conclusion irresistibly follows that the defendant company has such right under its charter grant to make such use of the streets of the Village of Upper Sandusky as is necessary for the conduct of its business, and that so long as the company shall comply with lawful municipal regulations there is no power in the village to interfere with or to impair such right of operation. Its right to enter upon and to use the streets of the village is one derived directly from the State and not from the village. True, the village can control an exercise of this franchise so granted by the State as respects the exercise of the police power and regulation of rates and with respect to such other matters as to which it has stipulated for control in giving its original consent to the exercise of the State franchise within its streets. But, all these things the village can do, not because it granted the franchise, but because State legislation has given to the village authority in such matters.

The language of the Supreme Court of the United States in the case of *City of Louisville vs. The Cumberland Telephone Company,* 224 U. S., 658, is quite pertinent to the question. There, as here, the company had been required as a condition precedent to the exercise of the franchise in Louisville to obtain the consent of the city, and, referring to the legal effect of such consent, Mr. Justice Lamar says in the opinion:

> "But when the assent was given the condition precedent had been performed. The franchise was perfected and could not thereafter be abrogated by municipal action, for, while the city was given the authority to consent, the State did not confer upon it the power to withdraw that consent, and no at-

tempt was made to reserve such a right in the collateral contract contained in those provisions of the ordinance relating to the company's giving a bond and carrying the police and fire wires free of charge. If those, or other terms, of this independent or separate contract had been broken by the Ohio Valley Company or its successors the city would have had its cause of action. But, the municipality could not by an ordinance impair that contract nor revoke the rights conferred. Those charter franchises had become fully operative when the city's consent was given, and thereafter the company occupied the streets and conducted its business, not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky. Such franchise granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of the General Council."

4. IN LEGAL CONTEMPLATION THERE WAS NO ABANDONMENT OF ANY FRANCHISE RIGHTS.

(a) There was no intention to abandon, and no abandonment in fact.

(b) The franchise rights are entire.

(c) They do not depend upon user of all the streets.

(d) Company has no power to abandon part of its rights.

(a) Abandonment implies an *intention* to relinquish. The mere fact that the Plaintiff in Error, after the dispute with the village about the price of lighting, and the refusal of the village further to pay at the contract rate, dismantled that portion of its plant used in street-lighting, is as reasonably referable to the obsolete condition of its lamps and street-lighting plant, or their

state of disrepair, as it is to an intention to abandon the business of street-lighting; indeed, it seems to be more reasonably to be inferred that the company did not intend to abandon the street-lighting business or its franchise to do street-lighting, because it continued to exercise, and still continues to exercise, the franchise to do private lighting. Its conduct in this respect must be referable to its franchise rights, for it must be held to know it would have no right to furnish private consumers with electricity for light and power without a franchise therefor. The company, having accepted the franchise to do street as well as private lighting, thereby assumed obligations to do the same, and it must be held that the company knew at all times that it might be compelled by the proper court action to fulfil its duties to the village, and to its citizens, under the franchise. The company at all times has been solvent, and there was no reason why it could not have been compelled to perform its obligations under the franchise as to street-lighting, had that course seemed desirable to the council. The council, after the expiration of the original contract for street-lighting, failed to pass an ordinance requiring the Plaintiff in Error to light the streets. As was said by Judge Schofield in deciding the case in the Common Pleas (Appendix p. 65):

> "It will be noted that this suit was commenced on the 31st day of July, 1914, so that for the period from the 31st day of December, 1912 to the 31st day of July, 1914—some nineteen months—no contract existed between the parties for furnishing lights for the streets.
>
> "For the period from the 31st day of December, 1912 to the 16th day of October, 1913 whatever was paid to the company, there being no contract between the parties, was absolutely illegal.
>
> *City of Wellston vs. Morgan*, 59 O. S. 147.
>
> *Same vs. Same*, 65 O. S. 219.

"And it was because there was no contract that the Company refused to continue lighting.

The Company was justified in refusing to continue to furnish lights in the absence of an express contract by ordinance with the village, and its failure to do so is to be commended rather than condemned."

(b) That the franchise rights obtained under the Act of January 26, 1887, are an entirety and not divisible.

The Act of January 26, 1887, (84 O. L. 7), in conferring the powers enjoyed by magnetic telegraph companies under Section 9170, General Code (Sec. 3454, Revised Statutes), referred to electric light and power companies as follows:

"* * * companies organized for *the purpose* of supplying public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places * * *."

Should this language be construed as granting separate franchises for the purpose of supplying public and private lighting, or as conferring one franchise for both purposes? Should the company have the right to use the streets for private lighting, and refuse to do public lighting? Should the company have the right to accept the grant for both kinds of lighting, and thereafter refuse to render either private or public lighting?

The judgment of the Court of Appeals has divided the franchise rights of the company. Such division of the franchise rights is based upon the present user and occupancy of the streets, and not upon the question whether the existing equipment is used for private lighting or for public lighting. The Supreme Court, in affirming said judgment, has apparently divided such franchise rights into those franchise rights relating to private lighting, and those franchise rights relating to public

lighting. As only the poles, wires and equipment for public lighting were removed from the streets, it would seem from the third paragraph of the syllabus that only such rights had been abandoned, and that all other rights under the franchise remained unaffected.

Can the company abandon its right to do public lighting, and be permitted to use the streets for private lighting? Or, can the company abandon its right to do public and private lighting on certain streets, and be permitted to use the streets not abandoned, for both public and private lighting? The question whether the franchise rights are an entirety or divisible is considered fully under the following heading.

(c) That such franchise rights do not depend upon the user and occupancy of all the streets.

What constitutes an acceptance of the franchise rights granted by the Act of January 26, 1887? Is the occupancy of all of the streets essential to such acceptance? If the franchise is an entirety, is not the construction of the plant and the occupancy of a portion of the streets a proper acceptance? Or should the franchise be regarded as divisible into as many parts as there are streets in the municipality and purposes for which the streets are used for lighting? In short, is the franchise a divisible grant, accepted street by street, as poles, wires and equipment are constructed and used therein, or is the franchise an entirety which may be accepted by the construction of equipment in a portion of the streets of the village?

This precise question has been fully considered and completely answered by the Supreme Court of the United States in the case of *Russell vs. Sebastian*, 233 U. S., 195 (decided April 6, 1914). It was held that the grant could

be accepted by a partial occupancy of the streets, and that the actual occupancy and user of the streets did not measure the range of the acceptance, nor limit the right or operations of the company. The Constitution of California granted to any individual or company, directly, the right to use the public streets for furnishing water or artificial light, but did not provide how such right should be accepted. While such constitutional provision was in effect, the Economic Gas Light Company was organized, purchased an existing plant in Los Angeles, and extended its system throughout a portion of the city, so that on October 10, 1911, it was serving 3500 customers. On October 10, 1911, the Constitution was amended in such a way as to permit the construction of gas light plants only under such conditions as might be prescribed by the organic law of the municipality. The City of Los Angeles thereupon passed an ordinance providing that no one should exercise any franchise or privilege in the streets, without having first obtained a grant from the city. The company, however, proceeded to extend its mains in the streets, without obtaining a grant from the city. Plaintiff in error was arrested for violating the city ordinance, and a writ of habeas corpus was obtained, upon the ground that the constitutional amendment and the municipal legislation impaired the obligation of the company's contract with the state, in violation of Article 1, Section 10, of the Federal Constitution. The Supreme Court of California held that the grant under the former constitutional provision took effect only upon acceptance and

> "* * * that the only means whereby an effectual manifestation of acceptance could be made was the act of taking possession and occupying the street for the purpose allowed; and hence that the vested

> right of the Economic Gas Company, at the time the constitution was changed, went only so far as its actual occupancy and use of the streets then extended. Concluding, upon this ground, that the company had no authority to lay pipes in the new street in order to extend its service into new territory within the city, the petitioner was remanded to custody. 163 California, 677, 678, 681." (233 U. S., 201, 202.)

It was conceded upon all hands that the grant under the former Constitution came from the state, and that upon acceptance by the company, it became a contract within the protection of the Federal Constitution. The only question was—What kind of acceptance was contemplated by the California Constitution? The United States Supreme Court held that the lack of a requirement of an acceptance of a formal character did not preclude the acceptance in fact. The real controversy related to the extent to which the grant had become effective through acceptance in fact.

The contention of the city on this point was as follows:

> "It is not contended that the change in the constitution could disturb the company's rights in the streets used previous to the amendment; but it is insisted that such actual user measured the range of the acceptance of the grant and hence defined the limits of its operation." (P. 205.)

The United States Supreme Court held that it was its duty to determine for itself the nature and extent of the rights under the offer contained in the California Constitution and the acceptance of such offer by the company. In discussing the nature of the offer, the court said:

"There is no ambiguity as to the scope of the offer. It was not simply of a privilege to maintain pipes actually laid, but to lay pipes so far as they might be required in order to effect an adequate distribution. The privilege was defined as that 'of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.'

"The breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light." (P. 206.)

It was held that the grant from the state was not a privilege to use particular streets, nor requiring a renewal of the offer, street by street, as the pipes were put in the ground, but that it was an entirety for all the streets of the municipality, the court saying:

"In deciding upon the policy of making these grants it was for the State to determine their terms and their scope; it could have imposed whatever conditions it saw fit to impose. But it did not attempt to confine the privilege to particular streets or areas, or to make the laying of the necessary pipes conditional upon the renewal of the offer street by street, or foot by foot, as the pipes were put in the ground." (P. 207.)

Upon the question of what acceptance was necessary to translate such offer into a contract, the court held that the establishment of a plant and the use of a portion of

the streets was sufficient. The acceptance was held to be as the offer, and was not limited to the actual user of the streets. Upon this question it is said by the court:

> "Such a grant would not be one of several distinct and separate franchises. When accepted and acted upon it would become binding—not foot by foot, as pipes were laid—but as an entirety, in accordance with its purpose and express language. *Grand Trunk Rwy. Co. vs. South Bend*, 227 U. S., 544, 555, 556.
>
> "It is urged that, in the absence of any provision for formal or written acceptance, the only way the offer could be accepted was by use of the streets, and that for this reason the rights of the company would not extend beyond the length of its pipes in place. *But this is to say that the offer as made could not be accepted at all; that the right to lay pipes could not in any event be acquired.*" (Italics are ours.) (Pp. 207, 208.)
>
> "In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted. *City Railway Co. vs. Citizens R. R. Co.*, 166 U. S., 557, 568; *Grand Trunk Ry. Co. vs. South Bend*, supra. In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city." (P. 208.)

This conclusion was justified by the Court not only from the point of view of the rights of the company, but

also upon the ground that the duty of the company to the community would not be discharged unless it could be compelled to extend its distributing system to meet the reasonable requirements of the community, saying:

> "This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the State's grant should assume. The service, as has been said, was a community service. Incident to the undertaking in response to the State's offer was the obligation to provide facilities that were reasonably adequate. *Lumbard vs. Stearns*, 4 Cush. 60; *Cumberland Tel. Co. vs. Kelly*, 160 Fed. Rep. 316, 324; *Atlantic Coast Line R. R. Co. vs. North Carolina Corp. Com'n*, 206 U. S. 1, 27; *People ex rel. Woodhaven Gas Co. vs. Deehan*, 153 N. Y. 528, 533; *Morawetz on Corporations*, Sec. 1129. It would not be said that either a water company or a gas company, establishing its service under the constitutional grant, could stop its mains at its pleasure and withhold its supply by refusing to extend its distributing conduits so as to meet the reasonable requirements of the community. But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative." (Pp. 208, 209.)

The offer made to electric light and power companies by the statutes of Ohio (R. S. Sec. 3454; G. C. Sec. 9170) is that such companies

> "* * * may construct * * * lines from point to point along and upon any public road by the erection of the necessary fixtures, including posts, piers, and abutments, necessary for the wires; but shall not incommode the public in the use thereof."

Likewise, in Ohio there is no provision for the acceptance of such offer. The same question, therefore, arises in this state, as to whether the establishment of

an electric light plant and the furnishing of service in certain streets, under authority of the Act of January 26, 1887, constitutes an acceptance of the offer in its entirety, or whether the acceptance is measured merely by the occupancy and user of the streets.

The petition in the case at bar does not allege that the company has removed the poles, wires and other equipment used for residence and business lighting in the village, but merely that the company has removed the poles, wires, and equipment used for lighting the streets and public places of the village. The allegation of the petition is as follows:

> "That said defendant within a short time thereafter, without the knowledge or consent of the plaintiff, *removed all of its street lights from the streets*, avenues and other public thoroughfares in said village, removed all of its *said wires*, cut down and removed all of the poles used for the support of *said wires and lights* and completely dismantled *its street lighting system* thus rendering itself wholly unable to furnish any electricity whatever for the purposes of public lighting and *placed itself in such a position that it cannot light any of the public places of said village and has rendered its plant absolutely worthless for that purpose.*" (Italics are ours.) (R. 14.)

It is conceded by the petition that the company has other poles, wires, and equipment in the village, which it is using for supplying private users with electricity; the claim made by the petition being that the right to continue to serve private consumers has been forfeited by reason of the dismantling and removing of the street lighting system.

Likewise the prayer of the petition, among other things, asks "* * * that said defendant be required to remove from the public highways of said village all of its equipment *now located thereon*, * * *" (R. 16.)

Both the Court of Appeals and the Supreme Court refused to forfeit the franchise, or to require the company to remove its existing equipment from the streets, as prayed for in the petition, and limited the scope of the decree to enjoining the company from erecting poles, wires, lamps, or other structures, in, upon, or over the streets, alleys, and public places within the corporate limits of the village, until the consent of said village shall have been obtained.

These judgments must proceed upon the theory that the company has a right to maintain its existing poles, wires and equipment, but that in those streets where it proposes to erect poles, wires, and other equipment, it has no franchise from the state and must obtain the consent of the village. *In other words, the right obtained from the state is measured by the present occupancy or user of the streets. Where such occupancy and user has continued to date, the state right is preserved, but where, since 1896, the occupancy and user in certain streets has been abandoned or not used, then the company is forever enjoined from erecting any poles or other equipment, without the consent of the village. It is important to note that the scope of the injunction is not limited to the erection of poles, wires and equipment for street lighting, but for all purposes,* even in those streets now occupied and used by the company, if perchance the company should desire to erect additional poles, wires, and equipment in those streets, or to substitute new poles, wires, and equipment, for the existing equipment. The Court of Appeals therefore took the narrow viewpoint, that the offer made by the Act of January 26, 1887, could not be accepted except by actual user and occupancy of the streets, and was therefore limited to

those streets actually used and occupied; and furthermore, that such acceptance was only effective during the physical life of the poles, wires, and other equipment, and that if at any time it was necessary to place additional equipment. These Courts, therefore, took the narrow view that the offer made by the Act of January The language of the decree is sweeping, namely—that the company is forever enjoined from "* * * erecting poles, wires, lamps, or other structures * * *," in any of the streets, without the consent of the village.

We submit, therefore, that the judgment of the Court of Appeals, and of the Supreme Court, affirming it, is not in accord with the law as announced by the Supreme Court of the United States, first, as to the scope of the offer made by the statutes of Ohio, and second, as to the effect of the acceptance of such offer by the company.

(d) That the company has no power to abandon part of its franchise rights.

If our contention is correct, that the offer and acceptance contemplated by the Act of January 26, 1887, is to use all of the streets for the purpose of public and private lighting, then the franchise right is an entirety. If it is originally acquired as an entirety, does it not necessarily follow that it must be abandoned as an entirety? It would seem to be obvious that a right which is an entirety, can not be severed or divided, either at the time of the original offer or at the time of the acceptance of the offer, or at any time thereafter. The discussion as to the nature of the offer and acceptance, we submit, is controlling as to the question of abandonment.

The Supreme Court of Ohio has repeatedly decided that as long as a public utility exercises any of the franchise rights granted to it by the state or by a municipality, it can not abandon any class of service in any part of the community within which its franchise rights extend. No consideration of the rights of the company would be adequate or conclusive, unless the question of the duties to the public were considered at the same time.

In a case recently decided by the Supreme Court of the United States the power to surrender a part of its franchise was denied to the company. We refer to *The Columbus Ry. P. & L. Co. vs. Columbus*, decided April 14, 1919. The only report of this case available to us is in the Ohio Law Reporter of May 12, 1919.

Viewing the question from the point of view of the public, can the company, while it retains any of its franchise rights, and particularly the right to furnish light and power to private consumers, abandon the duty of furnishing light and power for public lighting? If the situation were reversed and the company failed or refused to furnish light for private use, could it retain the right to use the streets for furnishing light for public lighting? In short, is the franchise right in question, divisible, or must it stand or fall in its entirety?

The Supreme Court of Oho has definitely announced its position upon the question of abandonment of service by public service companies. Where such companies have abandoned, or attempted to abandon, a portion of the service, but continue to exercise any of their franchise rights, this Court has not only repudiated the right of abandonment, but has compelled the company to render the service in question.

In *Gas Light Co. vs. Zanesville*, 47 O. S., 1, an action was brought by the Gas Company to enjoin the city from

using the gas of the company, on the ground that its contract with the city had expired, and that it was not obliged to furnish gas unless the city entered into a new contract. The company removed its burners from the public lamps and was undertaking to disconnect its pipes from the pipes leading to the lamps, when the City of Zanesville, by the use of force, prevented the disconnection. The prayer of the petition was that the city be enjoined from interfering with the disconnection of the pipes by the company, and other steps which the company wished to take to discontinue the public lighting. The Court denied the injunction and dismissed the petition, on the ground that the company had accepted a franchise in the public streets and had devoted its property to public use. As the city had passed a rate regulating ordinance, fixing the maximum rate which the company could charge, the Court held that it was the "duty of the company to supply the city at the rates fixed by the ordinance, so long as it continued to manufacture gas and avail itself of the franchises with which it had been clothed by its charter and the ordinance of the city * * *" (p. 33.) While this injunction suit brought by the company was pending, the city brought an action to compel the company to furnish gas to it, for lighting the public streets. The Court, in *Gas Light Co. vs. Zanesville*, 47 O. S., 35, held that it was the duty of the company to furnish gas to the city at the ordinance rates, and that if the company refused to furnish the same, it may be compelled, by mandatory injunction, to do so " * * * so long as it continues to exercise and enjoy its franchises as a gas company."

On page 50, the Court said:

> "The company was certainly under an obligation to manufacture and sell gas to the city of Zanesville and its citizens, by accepting and exercising the franchises granted it by its charter and the ordi-

nance of the city granting it the use of its streets and alleys for the purpose of distributing gas to its consumers."

Again it is said, in respect to the decree of the Circuit Court:

> "The decree is guarded: It does not compel the company, without limitation, to furnish gas, but only so long as 'it continues to exercise its franchises within the city of Zanesville.' It might have been couched in a negative form by restraining it from disconnecting its pipes from those of the city so long as it continued to exercise its franchises in the city—and which would have been more in accordance with the practice by which mandatory injunctions are made operative. *Pom. Eq. Juris.*, Sec. 1359 and note 2. But as, in this case, the result would be the same, we see no need of modifying the decree." (p. 51.)

The facts in these cases show that the company was still furnishing gas for private lighting under its franchises, so that the question arose whether while retaining the franchise rights, it could abandon a portion of its lighting, namely—that used for illuminating the streets and public places of the city.

In *East Ohio Gas Co. vs. Akron*, 81 O. S., 33 (1909), the question arose whether a public service company could abandon all of its franchise rights and wholly withdraw its service from a municipality. In recognizing the right of the company to abandon its franchise rights *in their entirety*, the Supreme Court of Ohio was very particular to state that the decision in *Gas Light Co. vs. Zanesville, supra*, was not intended to be modified or affected; the fifth paragraph of the syllabus being as follows:

> "But so long as such gas company continues to exercise any of its franchises within the contracting municipality, it may be compelled to exercise its

franchise therein fairly and without discrimination. *Gas Light Co. vs. Zanesville*, 47 Ohio St., 35, approved and distinguished."

Also on pages 55 and 56 the Court says:

"This is in accord with the judgment of this court in *Gas Light Co. vs. Zanesville*, 47 Ohio St., 35. The question there was whether Section 2478, Revised Statutes, could be applied to a company organized under the old constitution and which was endeavoring to disconnect its pipes from the street lamps and city buildings, but was at the same time continuing to supply the private consumers with gas. The question whether the gas company might wholly quit business in the city and withdraw by disconnecting and taking up its pipe lines, was not in the case and was not considered. A reference to the twin case of *Zanesville vs. Gas Light Co.*, 47 Ohio St., 1, at page 10, will disclose the fact that the ordinance under which the Zanesville Gas Light Co. obtained the privilege to lay its pipes in the streets and alleys of Zanesville, it was expressly provided that, 'The Zanesville Gas Light Company shall during such time as they enjoy the privileges granted by this ordinance, supply the town council with such quantities of gas as may be by them required for public lamps at a price not exceeding,' etc.: Therefore, when it was held in *Zanesville vs. Gas Light Co., supra*, that the price of gas might be controlled by Section 2478, Revised Statutes, it followed as held in *Gas Light Co. vs. Zanesville, supra*, that if the gas company refused to obey the second ordinance regulating the price it might be compelled by mandatory injunction to do so, 'so long as it continues to exercise and enjoy its franchises as a gas company,' which franchises were to be a gas company in Zanesville only. If The East Ohio Gas Company were insisting upon a right to furnish gas to some of its patrons in Akron and at the same time refusing to

> do the same service to others, it is not doubted that the doctrine of the *Zanesville case* would receive great consideration, notwithstanding that the original Akron ordinance does not contain the controlling provision which is found in the Zanesville ordinance. But that is not this case."

The same conclusion has been announced by the Supreme Court of Ohio with respect to railroad service, namely—that as long as the railroad undertakes to exercise any or all of its franchise rights, it may be compelled to furnish a class of service which it has discontinued, or which it threatens to discontinue.

In *Adena Railroad vs. Public Service Commission of Ohio*, 92 O. S., ... (decided March 16, 1915), the Court held that as long as the railroad undertook to exercise the rights, privileges and franchises of a railroad company, under the laws of Ohio, it could be compelled to furnish a service which it had never performed or which it had abandoned. The railroad in question furnished freight service but did not furnish passenger service, and the Court held that although the railroad merely held itself out as a carrier of freight, that fact does not impinge upon the right of the state to compel the exercise of its franchise, if that franchise existed at the time of the grant, saying:

> "Having the undoubted power, under its charter, to perform the functions of a common carrier of passengers, it became amenable to the state's control in relation to that specific duty. Its obligations are mutual and correlative. Since the railroad company under its franchise could insist upon its right to carry passengers, the state could also insist upon the performance of that duty by the carrier within reasonable limits." (O. L. R., December 20, 1915, p. 4.)

Also in the case of *Hocking Valley Railway Co. vs. Public Utilities Commission of Ohio*, 92 O. S., 9, (decided March 16, 1915), the Supreme Court of Ohio held that the railroad could be compelled to continue the operation of interurban cars between certain points, on the ground that the enjoyment of its franchise entailed upon it the performance of such duties as the law might impose, saying, (pp. 18, 19):

> "It is not shown that there is any special franchise provision or any contract by which the defendant expressly agreed to render the service in question. Therefore, the order of the commission must find its validity, if at all, by reason of the fact that the defendant is a public utility, incorporated and organized under the laws of the state, and that while exercising the rights and privileges accruing to it as such, it has by its acts and conduct created the situation found by the commission to exist and that from this situation a duty is imposed upon it which it can not disregard in the absence of such a showing on its part as above indicated.
>
> "It is well established that the benefits which result to the public constitute the consideration for the grant by the state of the franchises, rights and privileges held and exercised by a railroad company, and that their acceptance by the company imposes on it the obligation to operate the railroad which it was incorporated to construct, when constructed, and of doing so in the manner and for the purposes contemplated in its charter. One of the obligations thus imposed is to so operate its trains that they will reasonably serve the needs of the public."

In the case at bar the company merely removed and dismantled a portion of its poles, wires, and equipment, namely—that part which was used for the purpose of public lighting. Such removal, under the foregoing de-

cisions, would not relieve the company from its obligation to furnish electricity for public lighting. The decision in the *Zanesville case* would require the company to continue public lighting, provided the village council passed an ordinance fixing the maximum rate for electric light. The village, in the case at bar, did not seek to pursue the remedy offered by the law, but undertook to forfeit all of the rights of the company in the village. The decree of the Court of Appeals treated the franchise rights as divisible, and undertook to enjoin the company from erecting any poles, wires, or other equipment, in the future, but preserved to the company the right to use its existing poles, wires, and equipment. Although the judgment of the Supreme Court affirms that of the Court of Appeals, the third paragraph of the syllabus seems to hold that the only right abandoned by the company was the right to use the streets for the purpose of public lighting. Although the company was still furnishing private lighting in the village, and was exercising rights obtained under the Act of January 26, 1887, it seems to be now held by the Supreme Court that the franchise right was divisible, and that that portion of the franchise right which relates to public lighting, has been abandoned by the company, and therefore forfeited. Is not this conclusion in conflict with the cases cited above, where it is held that as long as the company exercises any of its franchise rights, it is under a duty to furnish its service to the public, including the municipality itself. If such duty exists, it must follow that the company must enjoy the right by which such duty can be performed.

We submit, therefore, that if it appears, first—that the right of the company is to use all of the streets of the municipality, and is not measured by the actual user or

occupancy of the same, and second—if the right of the company is an entirety and not divisible, it should follow that the failure of the company to occupy certain streets, or the removal of equipment from streets already occupied, does not in any manner affect the franchise rights of the company, nor its duty to the public. As the franchise right was obtained from the state, the question whether the equipment was removed with the consent of the municipality, becomes immaterial. If the state did not stipulate that the rights of the company should be dependent upon continuous user of all the streets, the removing and dismantling of certain equipment in streets, with or without the consent of the municipality, should not jeopardize the franchise. The removal of a *portion* of the equipment of the company from certain streets certainly could not discharge the company from its franchise obligations, as long as it retained other franchise rights in the village; and likewise, the rights of the company, going hand in hand with its duties, can not be abandoned unless the company removes and dismantles *all* of its equipment and wholly withdraws from the municipality.

Even though it be assumed that the franchise rights are divisible and that a portion may be abandoned, yet before there can be such abandonment there must be a refusal and before there can be a refusal there must be a legal and proper offer of a contract by the village; in other words, there can be no acceptance without an offer.

The law provides the manner in which a municipality may enter into contracts, and in the absence of a showing upon the face of the petition that the village took the necessary steps to make a legal tender of a legal contract, there can be no assumption that the company forfeited its right by failing to light the streets of the village.

In the absence of a legal contract the company could not have collected compensation for service. *Wellston vs. Morgan*, 59 O. S., 147; *Same vs. Same*, 65 O. S., 219.

Surely no court would say that in order to maintain its franchise rights granted to it by the State to do street lighting, a company in the absence of a contract, would have to furnish gratuitous service.

In order to work an abandonment of the street lighting privilege the company would have to be in default by reason of refusing or being in a position of being unable to accept a legal tender of a legal contract *at the time it was offered*. No such contract having been offered, how can it be said that the company ever refused or was in a position of impossibility of performance? True, the company had temporarily dismantled its street lighting system, but there is nothing to show that had a proper contract been offered, the company would not have immediately reinstalled its street lighting system in time to have complied with the terms of the contract.

5. THE JUDGMENT OF THE SUPREME COURT IN AFFIRMING THE COURT OF APPEALS IS IN CONFLICT WITH ANNOUNCEMENTS CONTAINED IN THE OPINION, AND IS NOT IN ACCORDANCE WITH THE PRINCIPLES OF EQUITABLE PROCEDURE.

The judgment of the Court of Appeals is—

> "It is therefore adjudged and decreed by the Court that said defendant be forever enjoined and restrained from erecting poles, wires, lamps, or other structures in, upon or over the streets, alleys and public places within the corporate limits of said village until the consent of said village shall have been obtained."

The judgment of the Supreme Court is—

> "The judgment and decree of the Court of Appeals will therefore be affirmed."

It is apparent that the effect of the judgment of the Court of Appeals is to restrain the company from making any extensions or renewals without the consent of the village, in either its commercial or street lighting, and by the terms of the judgment of the Supreme Court that injunctive order is affirmed.

But in the course of the opinion, the Supreme Court says, (93 O. S. 442):

> "The defendant without the knowledge or consent of the plaintiff removed all of its street lights from the streets, avenues and other public thoroughfares in the village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street lighting system and rendered itself wholly unable to furnish any electricity whatever for the purpose of public lighting. It is manifest from Section 3 of the ordinance that the parties contemplated public lighting as an essential consideration leading to the granting of the franchise, which was accepted by the predecessor of the plaintiff in error. * * * By reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to *the extent set forth*, it cannot now return and repossess itself, of *such* rights as it abandoned without the consent of the village in accordance with existing law." (Italics are ours.)

It is manifest from a reading of this language, with especial reference to the words italicized, that the Supreme Court intended that if there were an abandonment of any right of which the company could not re-possess itself without the consent of the village, it was the right to do street lighting, and that right alone.

So, if we are wrong in all our contentions herein before made; if the franchise can be abandoned in part, as the Supreme Court found it could; and if a forfeiture can be decreed in this kind of action, it seems to us the final judgment of the Supreme Court should, in order to be conformable to the principles of equity and equitable procedure, be modified so as to reflect the facts found by that court and confine the injunction to an inhibition against further use of the franchise for street lighting purposes.

We, however, insist on our position throughout this brief, and submit that the extent the state court can go, without violating the constitutional provisions cited, would be, by mandatory injunction, to require Plaintiff in Error to restore its appliances used for street lighting and hold itself in readiness to serve the municipality in that behalf unless it surrenders its franchise *in toto*.

6. THE PETITION OF THE DEFENDANT IN ERROR, UPON WHICH THE FINAL JUDGMENT OF THE SUPREME COURT IS PREDICATED, IS INSUFFICIENT TO WARRANT THE RELIEF GRANTED.

We believe we have shown that the rights of Plaintiff in Error subsist in a grant from the state which was availed of, and under which contract rights were vested in the Plaintiff in Error which are protected by the provisions of the Federal Constitution hereinbefore referred to. Indeed, the Supreme Court of Ohio, in the opinion rendered in this case (93 O. S., p. 442) expressly says that in view of the statutory provisions which were in force at the inception of the enterprise, the village would

not be entitled to annul the company's rights. This must necessarily be predicated upon the court's conclusion as set out in the first section of the syllabus, that the Act of January 26, 1887 (84 O. L. 7) which made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, operated so as to constitute the power of such companies to occupy the streets of a municipality a grant from the state. The Supreme Court, in affirming the judgment of the Court of Appeals, proceeded on the theory that the Act of April 21st, 1896, Section 9193 of the General Code, which subjected electric light and power companies to "municipal control alone," and provided that no such companies shall occupy the streets, alleys, etc. of any city, town or village with its equipment to conduct electricity for lighting, heating or power purposes without the "consent to such municipality," applied so as to require the Plaintiff in Error, before it could avail itself of the contract rights previously vested, to again obtain the consent of the Village of Upper Sandusky to the use of the streets.

While Section 2, Article XIII of the Constitution of Ohio, providing that "corporations may be formed under general laws; but all such laws may from time to time be altered or repealed," would doubtless authorize the requirement that municipal consent be obtained as a condition precedent to the use of the streets, so far as any franchise grants made *after* the passage of the Act of April 21st, 1896, yet in view of the inhibition of Section 28, Article II, of the Constitution of Ohio, providing that "the General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; etc.," as well as the inhibition of Article I, Sec. 10 of the Federal Constitution, it is submitted that the Act of

April 21st, 1896, cannot be given such construction as would operate to destroy or impair the contract rights of the Plaintiff in Error previously acquired and vested. As was said in *City of Detroit vs. Detroit & F. Plankroad Company*, 43 Mich. 140, by Judge Cooley:

> "It cannot be necessary at this date to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightly have acquired."

As we have heretofore said, the Defendant in Error's original petition was plainly an action to declare a forfeiture and if, as we have heretofore argued and believe we have shown, a forfeiture can be declared only by the State in an action in *quo warranto*, and if the effect of the decision here complained of is tantamount to a forfeiture, as it certainly is, then the final judgment of the Supreme Court, here sought to be reversed, not only violates the constitutional guaranties invoked, by impairing the obligation of a contract, and taking, by destroying, the property of Plaintiff in Error without any compensation, but effects a destruction of its contract rights without due process of law, for, as we have pointed out, that phrase as used in the Fourteenth Amendment means not only the general law of the land, which protects life, liberty, property, and immunities, but rights under the laws of procedure as well.

Twining vs. New Jersey, 211 U. S. 78.

Furthermore, the relief granted is practically a forfeiture, and if all the averments of the petition were true, that relief cannot be granted on this petition.

CONCLUSION.

The importance of the decision of this case must be manifest to the Court and we submit the same with the confident feeling that it will receive consideration commensurate with that importance, and that the fundamental principles herein contended for will be recognized and confirmed, thereby announcing that as was said in *Hudson Ill. Co. vs. Mayor*, Etc., 49 N. J. L. 305,

> "*the notion that a corporation, which, under provisions similar to the present act, has, upon the strength of a permission to use streets, spent thousands of dollars in erecting its poles and stretching its wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment, for a view that the rights of a corporation are of so unsubstantial a character is opposed to all judicial statements from the Dartmouth College case to the present time.*"

The rights of public service corporations and the protection of the individuals holding securities issued by such corporations require that the questions involved in this case, as above outlined, be definitely determined.

The very able opinion of Judge Scofield given at the conclusion of the argument in the Court of Common Pleas so clearly states the logic of the case that we beg leave to attach it hereto as an appendix to this brief.

We also include in the Appendix the ordinances of the village referred to in this brief.

Respectively submitted,

H. T. Mathers and
Thos. M. Kirby,
Solicitors.

Squire, Sanders & Dempsey,
Counsel.

APPENDIX.

IN THE COURT OF COMMON PLEAS
Of Wyandot County, Ohio.
No. 8614.

THE VILLAGE OF UPPER SANDUSKY, OHIO,
Plaintiff,

against

THE HARDIN-WYANDOT LIGHT COMPANY,
Defendant.

Decision by Judge William E. Scofield.

I am very much indebted to counsel on both sides of this case for the able manner in which it has been presented, and it seems to me that a conclusion can be arrived at that should be satisfactory so far as the law is concerned, by a not very lengthy discussion of the principles that have been laid down by the authorities cited:

Most of the differences between counsel in the discussion of the case arise from what is, in my judgment, a failure to note the distinctions between the franchise right of the defendant company granted to it by the state and the duties and obligations of the company under its contract with the Village of Upper Sandusky under the ordinance passed by the village council. The obligations of the company to the Village of Upper Sandusky, under its contract with it, and its rights under its charter granted by the state are two entirely different matters, and the proper recognition of these differences can lead to but one result.

So far as the granting of franchises in this state is concerned the legislature has retained the right to grant some of them, and as to others it has delegated this right

to municipalities under general laws passed from time to time, and when so delegated to them the village councils have these rights to the extent the legislature may have granted them. Of course, unless the power is delegated by the legislature to the village council that body would have no right to grant a franchise in any case, and without such right being delegated the council would have no right to forfeit a franchise or privilege already granted by the state. That right would remain in the state.

Now, the state has not delegated the right to grant franchises for the use of the public highways to telegraph and telephone companies for the purpose of conducting the wires by which the business of their utilities is transacted to any municipal authority, but has reserved this right to itself. Good reasons can be readily seen why this is the case. Telegraph and telephone systems extend all over the state, and the lines of one Company may extend from one border of the state to another, passing in and out of many muicipalities, some of which may not even desire the service because already supplied, or for other reason. If each municipality were permitted to grant or withhold the franchise to use its streets or highways for such purpose, as it saw fit, the use of a great public convenience by the public generally might be very much hampered, at the whim of some one municipality. At least great delay in establishing the lines might, and frequently would, result. The right to withhold the franchise to use the streets would also frequently tend to foster monopolies. So that when telegraph or telephone companies are incorporated under the general laws of this state, the legislature grants to them the right and franchise, of using its highways for the erection and maintenance of their lines thereon.

Section 9170, General Code, provides:

"A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof."

By Section 9191, General Code, the provisions of this section are extended to telephone companies and by Section 9192 to electric light companies. And this right was granted to defendant's predecessor, The Citizens Electric Light and Power Company of Upper Sandusky, Ohio, who constructed its lines in Upper Sandusky, and to defendant, The Hardin-Wyandot Light Company, when it was chartered and authorized to carry on its business as an electric light company in this state.

Under these sections of the statutes the defendant has the right and franchise to use the public streets in the Village of Upper Sandusky for the construction of its lines from point to point by the erection of its necessary fixtures, including the posts, piers and abutments necessary for its wires, but it must not incommode the public in the use of such streets. This is its right under the law. This, with other rights given it, is its franchise from the state—the right to use the public roads.

It is unquestionably true that the light company must also have the grant from individuals or exercise its right of eminent domain in obtaining them, in so far as it invades the property rights of the abutting proprietors on the highways in the construction of its lines. But no such rights are claimed to have been disturbed in this case.

Section 3714, of the General Code, provides that

"Municipal corporations shall have special power to regulate the use of the streets to be exercised in

> the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, aqueducts and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

And Section 9193 provides as to electric lighting companies that,

> "in order to subject such companies to municipal control alone, no person or company shall place, string, construct or maintain a line, wire, fixture or appliance of any kind to conduct electricity for lighting, heating or power purposes through a street, alley, lane, square, place or land of a city or village without the consent of such municipality. This inhibition also extends to all levels above or below the surface of such public ways, grounds or places, as well as along their surfaces, but not to rights heretofore received through and exercised under, proceedings of a probate court."

Now while the council of a municipality has unquestionably the right to regulate the use of its streets by a lighting company, this right must be exercised within reasonable limits, and not for the purpose of destroying the right granted by the state for that purpose. Indeed the right to use the street would be of little or no value if the council could arbitrarily or unreasonably prevent its exercise. These sections should be fairly and reasonably constructed so as to permit the full right of regulation by council of such use, even to the extent of prohibiting the use of certain streets, or of certain appliances, or of providing against the erection of poles or overhead wires at all—if the circumstances and conditions warranted it. And this right of regulation, exercised by council, would be under these statutes unlimited, so long as it was not unreasonably or arbitrarily exercised.

As to a plant already constructed the council would have the right to make such regulations from time to time as the exigencies of the case might require or changed conditions would dictate. So that under the law as it would appear to be, at the time of the commencement of this suit the defendant, The Hardin-Wyandot Electric Light Company, had the right under its franchise from the state to use the streets of Upper Sandusky for the erection of its poles and wires, subject to the right of the council of that municipality, to regulate that use in any reasonable way that body deemed proper. And it is important to know that the defendant and its predecessor, The Citizens Electric Light Company, had been in the exercise of this right for many years. So far as appears in the evidence the regulations contained in the ordinance originally passed on March 4, 1889, when the latter company commenced business in Upper Sandusky are the only regulations ever adopted by the council on the subject of the use of its streets by lighting companies.

It must be remembered that the courts have not been charged with the care, supervision and control of the streets in Upper Sandusky, but that these streets have been placed in charge of the village council under the law. Until some action, reasonable or unreasonable, has been taken by that body there are no just grounds upon which the courts can properly intervene.

If the Court is right in the interpretation of the statutes applicable to the rights of the defendant lighting company, and its franchise to use the streets is granted by the state, subject to the regulation of such use by the municipality, then the defendant was not operating under an indeterminate contract with the village, existing only as long as the parties could agree, and the case of *The East Ohio Gas Co. vs. City of Akron*, 81 O. S., 33, can have no application. Indeed in my judgment that

case accords with and is an authority for many of the views expressed by this opinion. As held in that case if the franchise is granted by the state, then the state alone can complain of its abuse or mis-use and *quo warranto* would seem to be the appropriate remedy.

However, none of the statutes applicable to the defendant company could have received a construction in the *Akron case*, which related to a gas company, and as to which none of the statutes relating to an electric light company *would* have any application.

If, then, the contract was one that the village did not have the right to terminate at its pleasure, and assuming that a Court of Equity has the authority to grant the relief asked by the plaintiff, we may consider the facts which are claimed as the basis for granting the relief asked.

The predecessor of the defendant, that is to say, The Citizens Electric Light and Power Company had a contract with the Village of Upper Sandusky for lighting the streets, alleys, avenues and other public thoroughfares of the municipality, and the defendant, The Hardin-Wyandot Light Company, succeeded to the rights and assumed the obligations of the first named company under this contract; this contract for lighting the streets, by its terms, expired December 31st, 1912.

Negotiations were had from time to time between the lighting committee of the village council and the defendant from the 31st day of December, 1912, until the 16th day of October, 1913, and proposals were made on both sides for furnishing the public lighting for the village, but the light company would not accept the propositions from the village, and the village would not accept the propositions of the company. On this date, Oct. 16th, 1913, the light company, having notified the village on August 19, 1913, that its equipment was in such condi-

tion that it was extremely doubtful that it could maintain its service for more than 30 days, removed its street lights from the village thoroughfares and took down the greater part of its equipment used in its street lighting system. At this time its street lighting equipment was in a bad state of repair, but the lighting company was and now is ready, able and willing to install a modern system of street lighting upon what it considers fair and reasonable compensation for the service furnished.

So that the disagreement between the parties as to the rates to be charged for street lighting is the foundation of the troubles which have resulted in this suit. The village and the company could not agree as to the prices for lights and the company refused to furnish further lighting in the absence of an agreement with the village.

It will be noted that this suit was commenced on the 31st day of July, 1914. So that for the period from the 31st day of December, 1912, to the 31st day of July, 1914, some nineteen (19) months no contract existed between the parties for furnishing lights for the streets.

For the period from December 31st, 1912, to October 16th, 1913, whatever was paid to the company, there being no contract between the parties, was absolutely illegal.

City of Wellston vs. Morgan, 59 O. S., 147.
Same vs. Same, 65 O. S., 219.

And it was because there was no contract that the company refused to continue lighting.

The company was justified in refusing to continue to furnish any lights in the absence of an express contract by ordinance with the village, and its failure to do so is to be commended rather than condemned.

The General Code provides for the making of such contracts, and the first step must be taken by the village in passing an ordinance fixing the rate deemed by it to be

reasonable. If this rate is not satisfactory to the utility it may appeal to the Board of Public Utilities.

No ordinance has been passed or other action taken by the village council, so far as appears from the record or agreed statement of facts. The Court could not lawfully order the defendant to continue to light the streets in the absence of a contract with the village, nor should it make an order depriving it of its rights or privileges, or forfeiting them for a failure to furnish such light, in the absence of such a contract.

In my judgment the two motions interposed by the defendant, one for judgment in its favor on the pleadings, and the other at the close of the evidence should be overruled, but that on the entire case, and after hearing all the evidence and the arguments of counsel, I am of the opinion that the equities of the case are with the defendant, The Hardin-Wyandot Light Company, and that the plaintiff's petition should be dismissed at its costs, which will be so ordered.

IN THE COURT OF APPEALS
For Wyandot County, Ohio.
No. 11.

THE VILLAGE OF UPPER SANDUSKY,
Plaintiff,

vs.

THE HARDIN-WYANDOT LIGHT COMPANY,
Defendant.

Decided August 6, 1915.

Before Judges Crow, Kinder and Ansberry.

By the Court:

This is an action pending on appeal by the plaintiff to enjoin the defendant from operating under a franchise as the successor in interest of a corporation to which a franchise had been granted by the Council of the Village of Upper Sandusky by ordinance which contained no limitation as to time.

Two propositions are suggested in connection therewith.

First, there being no time limit fixed, and the council having taken appropriate action to terminate the franchise, it was thus ended. And,

Second, that by reason of the tearing out by the defendant of its poles, wires and lamps for public lighting, there was by it an abandonment of its franchise rights.

Injunction is also sought to prevent the defendant company from erecting new poles, wires and lamps either in the place of those torn down or in different places and on different streets, alleys and public places.

A majority of the court is of the opinion that injunction is not the proper remedy to determine the rights of the defendant company under the franchise claimed

under the ordinance granted to the predecessor in interest of the defendant, but that *quo warranto* is the appropriate and only remedy for determining that question. In this view, Judge Crow does not concur.

A majority of the court is of the opinion that the defendant company cannot make use of the streets, alleys and public ways of the Village of Upper Sandusky for the purpose of erecting poles, wires and lights or other structures thereon and thereover without the consent of the council of the village. In this view, Judge Ansberry does not concur.

A permanent injunction restraining the defendant company from erecting poles, wires or lamps or other structures in, upon or over the streets, alleys and public places in said village, until the consent of the council of the village has been obtained, will be allowed.

The ordinance of the Village of Upper Sandusky passed March 4th, 1889, is as follows:

An Ordinance Granting Certain Privileges to The Citizens Electric Light and Power Company.

Be It Ordained by the City Council of Upper Sandusky, Ohio:

Sec. 1st. That the Citizens Electric Light & Power Company of Upper Sandusky, Ohio, its associates, successors and assigns, are hereby authorized and empowered to use the streets, lanes, alleys, avenues and other public thoroughfares of the City of Upper Sandusky, Ohio, and it is hereby vested with full and necessary privileges for such use, for the purpose of erecting, maintaining and operating electric light wires, mains, apparatus complete for the manufacture and distribution of electricity for light and power.

Sec. 2nd. The Citizens Electric Light & Power Company in the construction of its plant or in erecting poles and conducting their wires for the distribution of electric current, shall not unnecessarily interfere or obstruct the passage of any street, lane, alley or avenue or other thoroughfare of said City and in crossing same shall erect said wires at such altitude as council may prescribe, and whenever it shall in any way change the present condition of any such street, lanes, alleys or thoroughfares it shall replace them in as good condition as before,

and in the event any litigation shall arise caused
33 by occupancy or use of the streets, lanes, alleys
or other thoroughfares, said Company shall assume liability for any damage to adjoining owners or persons injuriously affected and shall at its own expense defend any such suits and indemnify the City from any loss occasioned thereby.

Sec. 3rd. The privilege hereby granted the said Citizens Electric Light & Power Company shall entitle them to manufacture, sell and distribute light and power by means of electricity to the citizens of Upper Sandusky, Ohio, for public and private uses and the property of said Citizens Electric Light & Power Company, its associates, successors and assigns, so erected on the public streets, lanes, alleys and highways, shall receive same protection under the laws of the City as the property of other corporations engaged in similar business.

Sec. 4th. Said Citizens Electric Light & Power Company shall commence work on said electric light plant within ninety (90) days from the passage of this ordinance and completed it within six months (6) thereafter, otherwise this ordinance shall be null and void and the privileges hereby granted shall be declared forfeited.

Sec. 5th. This ordinance shall take effect on and after its passage and publication.

Passed in a regular session of the council March 4, 1889.

FRANK JONAS, *Mayor.*

E. N. HALBEDEL, *Clerk.*

The ordinance of the Village of Upper Sandusky, passed January 11, 1915, is as follows:

An Ordinance To Repeal an Ordinance Entitled, "An Ordinance Granting Certain Privileges to the Citizens Electric Light and Power Company," Passed March 4th, 1889, and to Provide for the Removal of all Poles, Wires and Other Electrical Appliances Belonging to The Hardin-Wyandot Light Company From Off the Streets, Lanes, Alleys, Avenues and Other Public Thoroughfares of the Village of Upper Sandusky, Ohio.

Whereas, the council of the Village of Upper Sandusky, Ohio, passed an ordinance, entitled, "An Ordinance Granting Certain Privileges to The Citizens Electric Light and Power Company" on the 4th day of March, 1889, and

Whereas, the company accepted said ordinance and erected an electrical works in said village and furnished electricity for public and private lighting and for power and on the 15th day of January, 1911, sold its plant, etc., together with all its rights acquired under and by virtue of the aforesaid ordinance to The Hardin-Wyandot Light Company, which last mentioned company has continued the business in said village, and

Whereas, The Hardin-Wyandot Light Company not only refused to enter into a contract for street lighting with said village which was reasonable and fair, but did during the month of October, 1913, without the consent

or knowledge of said village remove all its street lights, poles, etc., from off the village streets and leave said village in darkness for a time, and

Whereas, The Hardin-Wyandot Light Company has failed and refused to treat with the council as to the rates to be charged for commercial lighting and power and is charging consumers of electricity in said village rates which have been established by said company without the consent or approval of said village, and

Whereas, the acts aforesaid constitute and are an abandonment of the obligations assumed by The Hardin-Wyandot Light Company under the ordinance granting said company the right to use the streets, etc., of the village of Upper Sandusky, and

Whereas, according to the provisions of said ordinance it is binding upon the village and The Hardin-Wyandot Light Company only so long as both parties are mutually agreed to be bound thereby and it is the desire of the village as set forth in its resolution of December 1, 1913, to which this action is supplementary, for which reason and the acts set forth above, to be no longer bound by the terms of said ordinance and to have the light company remove its poles, wires, etc., from off the streets, alleys, etc., of the village of Upper Sandusky, therefore

Be it ordained by the council of the village of Upper Sandusky, state of Ohio:

Section 1. That an ordinance, entitled, "An Ordinance Granting Certain Privileges to The Citizens Electric Light and Power Company," passed by the council of the village on the 4th day of March, 1889, be, and the same hereby is, repealed.

Section 2. That consent to the use of the streets, lanes, alleys, avenues and other public thoroughfares of

the village of Upper Sandusky, Ohio, by The Hardin-Wyandot Light Company under and by virtue of the ordinance of March 4th, 1889, is hereby withdrawn and said The Hardin-Wyandot Light Company is hereby required to remove all its poles, wires, and other electrical appliances from off the streets, lanes, avenues, alleys and other public thoroughfares of the village of Upper Sandusky.

Section 3. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed January 11, 1915.

J. N. TRAXLER, *Mayor.*

Attest:

GEO. M. FLECK, *Clerk.*

INDEX.

Authorities Cited.

25,491

In the Supreme Court of the United States

OCTOBER TERM, 1916.
No. 661.

THE HARDIN-WYANDOT LIGHTING COMPANY,
Plaintiff in Error,

vs.

THE VILLAGE OF UPPER SANDUSKY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF OHIO.

REPLY BRIEF OF PLAINTIFF IN ERROR.

FOREWORD.

At the outset, we desire to call the Court's attention to the interpretation placed by opposing counsel upon the decree sought by this proceeding to be reversed or modified.

He says, last page of opposing brief, "The result of this decision is simply that it says to the plaintiff in error, 'You may continue to use and enjoy the electric light plant you now have in that village, but you cannot place any more poles, wires and other apparatus used in connection with a street lighting system, without the consent of such village,' and when the plaintiff in error does this its franchise is as before."

We think opposing counsel is correct in this interpretation, but the language of the decree enjoins plaintiff in error from erecting any poles, wires or other equipment for use in connection with furnishing electricity for *any* uses, street lighting or otherwise, thereby impairing the obligation of the franchise which opposing counsel admits still remains in plaintiff in error. The decree, as it stands, must necessarily be modified, not only to be consistent with the expressed opinion of the Supreme Court of Ohio, but to avoid the constitutional objections to which we have adverted in our former brief, even if the plaintiff in error were entitled to nothing further. But we contend, for the reasons set out in our former brief and in this one, that the decree should be reversed, and the judgment of the Court of Common Pleas, dismissing the petition, should be affirmed.

We desire, as briefly as possible, to reply to defendant in error's brief, not because any additional reasons or authority have been set forth therein which even challenge our position in our former brief, but because we want to point out wherein certain statements made in the opposing brief are irrelevant and inconsequential.

ARGUMENT.

I. The alleged facts stated in the opposing brief do not warrant the conclusions drawn.

Taking up defendant in error's brief in the order in which it is presented, we fail to see the purpose of the statement concerning the date and manner of the erection into a municipal corporation of the Village of Upper Sandusky, or its population, unless it be to suggest, without claiming, that the guaranties of the constitution of

the United States do not run into villages of small population, nor extend their protection over investments therein, notwithstanding the statutes of Ohio and the principles of the substantive and adjective law of the state are supposed to be, and have always been held to be, universally applicable within its jurisdiction, whether the point of resistance was in a thickly populated city, a village, or the country.

Nor is the purpose apparent for the statement on page 2 of the opposing brief that the property and assets of the original grantee of the franchise in the village were sold and transferred to this plaintiff in error "without the same being made known to said village," when immediately following it appears that a contract which existed between the original grantee and the village, for lighting the streets thereof, was recognized and performed by plaintiff in error, with the knowledge and consent of defendant in error, not only until its termination according to its terms, but continued for months thereafter. The truth is that plaintiff in error continued to light the streets of the village, with its consent, and for which it paid, for a period of some nineteen months after the expiration of the contract. (Our former brief, p. 71.) Complaint is made in the opposing brief that while repeated efforts were made by the village to get from plaintiff in error a quotation of prices for lighting the streets and public places, culminating in a written proposal to plaintiff in error about August 16th, 1913, of the prices the village would pay, which proposal was three days thereafter "arbitrarily rejected without comment," and without any counter-proposal, followed within sixty days thereafter by the demolition of plaintiff in error's street lighting system, yet, it appears, (p. 4 opposing brief) that from that time on, until August 1, 1914, nearly a year thereafter, no effort was made on the part

of said plaintiff (presumably meaning plaintiff in error) to renew negotiations looking towards a new contract with defendant in error, touching the lighting of the streets or furnishing commercial current at a satisfactory rate.

During this period of time, admittedly, (p. 4, opposing brief), plaintiff in error "continued to furnish commercial current to such consumers as it then had or afterwards acquired and was making great preparations to enlarge its then condition so that it could extensively increase its business," although, at the same time, according to the opposing brief, being absolutely helpless and wholly unable to enter into any kind of a contract to light the public places of said village, on account of the destruction of its street lighting system.

It is only necessary to point out here that, under the laws of Ohio, defendant in error, had it desired plaintiff in error to light the streets, could have compelled it to do so. To the statute in this behalf we will refer later on. Manifestly plaintiff in error had the facilities, and presumably the credit, for its insolvency will not be presumed, to replace with modern equipment the obsolete equipment which had been removed from the streets; and the fact that plaintiff in error was enlarging its plant and furnishing electricity for commercial uses, conclusively shows that it had neither abandoned its franchise, nor absolved itself from the duty under the statute and the law, to light the streets when required to do so. The plaintiff in error was under no obligation to negotiate, in advance of councilmanic action, respecting the terms it would be willing to light the streets upon; and the fact that the village did not avail itself of its corporate power to compel plaintiff in error to light the streets, if it desired plaintiff in error to do so, cannot be availed of by defendant in error as a ground for charging plaintiff in

error with an abandonment of the franchise that manifestly it did not intend to abandon.

II. The Village had plenary power under the laws of Ohio to compel plaintiff in error to light the streets. It had no power to declare a forfeiture of plaintiff in error's franchise. Neither could that be done in this action.

The council of defendant in error had plenary power not only to fix the rate for street and commercial lighting, but to compel plaintiff in error to discharge its obligations under the franchise. Section 3982 of the General Code, in its present form, was enacted March 31st, 1906, and was at the time referred to by defendant in error, and is now, in force. It is as follows:

> "Sec. 3982. The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains, or pipes are conducted, may regulate from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council. The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters

shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them."

This Section is found in Chapter 2 of Division IV, of Title XII, of the General Code of Ohio, which Title deals with municipal corporations. In passing, we desire to observe that the chapter referred to is entitled "Gas, Water and Electricity," and it is significant that while the power to fix rates extends to electric lighting, natural or artificial gas, gas light or coke companies, or water companies, yet by the provisions of the chapter, Section 3986, the franchise of gas companies alone, under the charter by which they had been established, may be forfeited for a neglect to furnish gas.

Section 3986 is as follows:

"Sec. 3986. A neglect to furnish gas to the citizens and other consumers of gas or to the corporation by any company in accordance with the prices fixed and established by the council from time to time shall forfeit all rights of such company under the charter by which it has been established, and the council may proceed to erect, or, by ordinance, empower any person to erect gas works, for the supply of gas to such corporation and its citizens."

Expressio unius est exclusio alterius.

In *Gas Light Company vs. Zanesville*, 47 O. S. 35, it was held that where it is the duty of a gas company to furnish gas to a municipal corporation at the rates fixed by an ordinance of the council thereof, it may, if it refuse, be compelled by mandatory injunction so to do, as long as it continues to exercise and enjoy its franchise as a gas company.

In *Toledo vs. Gas Company*, 5 O. C. C. 557, 3 O. C. D. 273, it was held that if a gas company refuses unreason-

ably to agree with a municipal corporation upon proper rates for gas, a court of equity would administer proper relief.

And in *East Ohio Gas Company vs. Akron,* 81 O. S. 33, 34, it was said in the syllabus (which in Ohio is the law of the case):

> "But so long as such gas company continues to exercise any of its franchises within the contracting municipality, it may be compelled to exercise its franchises therein fairly and without discrimination. *Gas Light Company vs. Zanesville,* 47 O. S. 35, approved and distinguished."

It is pertinent here to observe that the case of *East Ohio Gas Company vs. Akron, ante,* upon which defendant in error apparently entirely relies, is not in point, as we think we have shown in our former brief (pp. 33, 34, 35, 36), because a failure to furnish service by a gas company is expressly by the statute made a ground of forfeiture, while with respect to an electric light company, it is not; yet, concerning the remedy by mandatory injunction, the following quotation from the opinion in that case, (p. 56), which supposes a situation analogous to the one in the case at bar, shows that the municipality would have its remedy by such injunctive proceedings, if it so desired, notwithstanding the liability to forfeiture.

The quotation referred to is as follows, 81 O. S. 56:

> "If the East Ohio Gas Company were insisting upon a right to furnish gas to some of its patrons in Akron, and at the same time refusing to do the same service to others, it is not doubted that the doctrine of the Zanesville case would receive great consideration notwithstanding that the original Akron ordinance does not contain the controlling provision which is found in the Zanesville ordinance. But that is not this case."

A fortiori, the remedy by injunction was open to the defendant in error, (unless, indeed, application must first be made to the Public Utilities Commission), but not the attempted remedy of forfeiture.

The foregoing cases illustrate the character of relief which the courts will grant. Statutes exist in Ohio pointing out the procedure to obtain such relief in certain circumstances, although doubtless the courts, in cases not provided for by the statute, may still grant appropriate relief. To these statutes we now refer.

On May 31st, 1911, an act was passed by the General Assembly of Ohio (102 O. L. 549 *et seq.*), which was in force when the action at bar was commenced, and is still in force, Section 2 of which, (now known as Section 614-1 of the General Code) provides as follows:

> "The Railroad Commission of Ohio shall hereafter be known as the Public Service Commission of Ohio. In addition to the powers, duties and jurisdiction conferred and imposed upon said Commission by Chapter I, Division 2, Title 3, Part 1st of the General Code, and the Acts mandatory (amendatory?) or supplementary thereto, the Public Service Commission of Ohio shall have and exercise the powers, duties and jurisdiction provided for in this Act."

The name of the commission was subsequently changed to Public Utilities Commission.

Section 3 of the Act, now known as Section 614-2 of the General Code, reads as follows:

> "Section 3. The following words and phrases used in this Act, unless the same be inconsistent with the text, shall be construed as follows:" (omitting a long list of definitions of various words not pertinent, the Act then reads):

"Any person or persons, firm or firms, co-partnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated: * * *"

"* * * when engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, is an electric light company; * * *"

Section 5 of said Act, now known as Section 614-3 of the General Code, reads as follows:

"Section 5. The Public Service Commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate 'public utilities' and 'railroads' as herein defined and provided, and *to require all public utilities to furnish their products and render all services required by the Commission or by law.*" (Italics are ours.)

Section 46 of said Act, now known as Section 614-44 of the General Code, provides for an appeal to the Public Utilities Commission, by either the public utility or the municipal corporation, for a revision of the rates prescribed by ordinance of the municipality under Section 3982 General Code, quoted *ante,* and some other sections, and the hearing of such appeal; and Section 48 of said Act, now known as Section 614-46, of the General Code, relates to the finding by the Commission as to rates and its effect upon the right and duty of the public utility to charge accordingly. These provisions are not important here and for that reason not set out in full.

In *City of Washington vs. Public Utilities Commission,* 99 O. S., ——, No. 15,958, decided December 10th, 1918, and reported in Ohio Law Bulletin for July 28th, 1919, which was an action by the plaintiff in error to reverse an order of the Commission, permitting the Washington Gas and Electric Company to file a schedule

of rates to be charged the inhabitants of the city for electric current, the council having passed an ordinance to regulate the rates, which the company disregarded on the ground it was invalid because it was indefinite and uncertain and attempted to fix rates for power purposes, whereas the council was only authorized to fix rates for light purposes, the order of the Commission being reversed, it was said in the course of the opinion:

> "The commission is given specific authority to prescribe forms to be followed by public utilities by Section 614-16. If the company felt that the ordinance of the city, which prescribed the rates to be observed by it, was indefinite or invalid for any other reason, it could have attacked the validity in a court of competent jurisdiction; or if it did not desire for any reason to follow that procedure, it could have appealed the matter to the public utilities commission under the provisions of Sections 614-44 *et seq.* It would have then been the duty of the commission to have considered the complaint of the company and to have fixed a reasonable rate."

It is plain that the defendant in error had a remedy to compel the plaintiff in error to light its streets if it desired them lighted; and that the question of rates could have been definitively settled by law. It is also plain from the statements in the opposing brief that defendant in error did not desire to have what may be called a legal rate established, or to have the plaintiff in error light its streets, for it did not even attempt to avail itself of the means to that end provided by law.

It is pertinent here also to observe that the syllabus above quoted from *East Ohio Gas Co. vs. Akron, ante*, clearly lays down the rule that if the company "continues to exercise *any* of its franchises," it may be compelled to exercise its franchises in the municipality fairly and

without discrimination. And yet, in spite of the law as we have endeavored to set it forth above, defendant in error began this action "seeking to have the rights of the plaintiff in error in the streets, lanes, alleys and other public places in said village terminated, and the said plaintiff in error ousted therefrom." (p. 4, opposing brief.) Plainly, this was an action for a forfeiture. To grant such relief the Court had no jurisdiction in this action.

> "A judgment of ouster cannot be pronounced in any other proceeding than one in *quo warranto.*" *Gas Light Company vs. Zanesville*, 47 O. S. 35.
>
> "Injunction cannot be resorted to to work an ouster or to forfeit a franchise. Equity never decrees a forfeiture." *The Village of Milford vs. Cincinnati-Milford, etc. Traction Company*, 4 O. C. C. 191. (Our former brief, pp. 37, 38, 39.)

In this connection we call the Court's especial attention to the significant language of the opinion in *East Ohio Gas Co. vs. Akron, ante*, at p. 51:

> "*The remedy for non-user or mis-user of the franchise lies with the state; and the defendant in error, the City of Akron, can not invoke that remedy.*"

III. This action is properly here.

It is true no bill of exceptions was filed in the Supreme Court of Ohio embodying the agreed statement of facts, and we have made no claim that this agreed statement is before this Court; on the contrary, it appears from our former brief that it is not. But the record that is before this Court contains the reply of the defendant in error, filed in the Court of Appeals, wherein it is admitted that on January 11th, 1915, the council of the village of Upper Sandusky passed the ordi-

nance set out in the answer of defendant in error, a copy of which is set out in our former brief (p. 76). Matters thus adverted to in the pleadings, are, we sumbit, properly before the Court. That the Ohio Court of Appeals so considered it is apparent from the opinion of that Court, which is set out in our former brief (pp. 73, 74), wherein that Court say, after stating the issue, that two propositions are suggested in connection therewith, the first of which is that:

> "First. There being no time limit fixed *and the council having taken appropriate action to terminate the franchise*, it is thus ended." (The italics are ours.)

While the opinion of the Court is, perhaps, not a part of the record, yet it is a public document and properly published in the reports, and as legitimately to be considered as is the reported decision of any court. And, while we do not rest our contention on the fact of this ordinance having been passed, we think it may be looked to to see what was in the mind of the Court when it reached the conclusion it did, and to show how erroneous that conclusion was. While the Supreme Court, in affirming the judgment of the Court of Appeals, does not refer to the ordinance in question, yet the conclusion of the Supreme Court, in affirming *in toto* the judgment of the Court of Appeals, notwithstanding the former Court expressly finds that only the equipment used for *street lighting* was dismantled, must have proceeded upon the theory that the Court of Appeals proceeded upon.

However this may be, we think it is apparent that the effect of the decision below, of which we here complain, amounts practically to a forfeiture, (which, as we have heretofore shown, pp. 37, 38 of our former brief, cannot be decreed in this action); further, that whether

it is technically a forfeiture or not, the judgment below invades the constitutional rights of plaintiff in error discussed in our former brief. These constitutional questions were raised by the answer of the defendant in error in the Court of Appeals (R. p. 27), and as appears from the entry in that court, which is copied in full in the opposing brief (p. 7), the cause in that court was heard *upon the pleadings*, as well as the agreed statement of facts. The trial in the Court of Appeals, was a trial *de novo*, AND THE CONSTITUTIONAL QUESTIONS WERE THERE EXPRESSLY RAISED.

If from the record, omitting the agreed statement of facts, it appears the judgment below invades plaintiff in error's rights under the Constitution of the United States, then this Court has jurisdiction, and should decide that question. If the contention of the opposing brief, to the effect that the affirmance by the Supreme Court of Ohio of the judgment of the Court of Appeals forecloses any inquiry by this Court as to constitutional questions raised on the record, or apparent from the effect of the decision, then the provisions of law for the review upon error of the decision of a state court of last resort are rendered nugatory. Whatever may be the present view of opposing counsel as to the basis of defendant in error's contention, and that the passage of the ordinance of January 11th, 1915, undertaking to repeal the original ordinance and to oust plaintiff in error from its rights in the streets, the fact remains that the Court of Appeals predicated its relief partly on this action of the council, as appears from its opinion above referred to.

The federal question is not only raised in the pleadings, but the judgment of the state court necessarily involves a decision as to the plaintiff in error's rights under the Federal Constitution.

Louisiana Railway & Navigation Company vs. Behrman, Mayor of the City of New Orleans, 235 U. S. 164: In this case it was held that this Court had jurisdiction to, and must, determine *for itself* whether there is an existing contract, even though the state court may have put its decision upon the ground that there was no contract made, or it was invalid, or had become inoperative, in a case where the state court gave effect to later legislation which does impair the contract, if one existed.

Robey vs. Colehour, 146 U. S., 153, 159.

In the latter case, it is said: "If it appear from the record by clear and necessary intendment, that the federal question must have been directly involved so that the state court could not have given judgment without deciding it, that would be sufficient" (to confer jurisdiction).

IV. The opposing argument under the head, "Contention of plaintiff in error," is neither logical or persuasive.

We respectfully submit that the details of the negotiations between plaintiff in error and defendant in error respecting the price to be paid for street lights, found at pp. 15, 16 of the opposing brief, are not only beside the point, but in the absence of the agreed statement of facts, there is no evidence in this record to support those statements. During the "long period of negotiations" there referred to, plaintiff in error continued to furnish lights for the streets and the village council accepted that service. The law did not require the plaintiff in error to submit a bid for street lighting, nor a schedule of prices. The law empowered the council to fix the prices (Section 3982 Ohio General Code, *ante*), and there

is no basis either in logic or fact for the excoriation of the opposing brief, at p. 16, where it is said:

> "This vile thing (referring to the dismantlement of that part of the plant used for street lighting) was done by the plaintiff in error after long and deliberate calculation, and with the sole purpose in view of driving the defendant in error to accept the terms of the plaintiff in error for street lighting. No other reason then or has ever existed for this act, and the doing of it was so contemptible that honest men hated to mention it or to have it mentioned to them."

The lack of logic in the foregoing is obvious. After saying, on p. 17, that a schedule of rates was prepared and submitted by defendant in error to plaintiff in error, who immediately "spurned" it—we are curious to know how a corporation "spurns" an offer,—it is stated that the state of affairs referred to on the preceding page continued for nearly a year, during which time "no effort was made by the plaintiff to secure a contract to light the streets." If the streets needed lighting, it was the duty of the council to take steps to secure it. But if the "vile thing" referred to above was done for the purpose ascribed, then admittedly there was no abandonment of the street lighting part of the franchise, because the purpose of the doer of the "vile thing" was to coerce defendant in error into accepting the terms of plaintiff in error for lighting the streets. Furthermore, the matter quoted above is equivalent to an admission that the act complained of was not done for the purpose of abandoning the franchise and terminating a governmental relation, but for the purpose of coercing the village into entering into a contract relation purely commercial in character. To obtain any benefit from the relation, if entered into, would involve a retention of the franchise.

We presume opposing counsel does not mean to say what he does say at p. 17 of his brief, where it is said:

> "The franchise made in March, 1889, under which plaintiff in error holds its alleged rights in the village of Upper Sandusky contained no stipulation as to when it should terminate, and thereby became, in effect, perpetual,"

for immediately following the matter quoted above, he argues a *non sequitur*, and urges that by reason of the perpetual character of the franchise, when it became apparent that the parties thereto could no longer agree, some action was necessary to dispose of the matter so that the defendant in error "could look elsewhere for the commodity it needed and look to some other source for the service it required," citing in support of the proposition the case of *East Ohio Gas Company vs. Akron*, 81 O. S. 33, which held that a franchise of a gas company, indeterminate as to duration, existed only so long as the parties thereto mutually agreed.

As we have pointed out in our former brief (pp. 32, 33, 34, 35, 36), the law relating to gas companies is different from that governing electric lighting companies. Further, in *Northern Ohio Traction and Light Company vs. State, ex rel.*, 245 U. S. 574, the express point here raised was decided just the other way, viz., that a franchise without limit as to duration, in the absence of circumstances showing an intention to give or to accept a mere revocable right, is a contract not subject to annulment at the will of the granting authority. In this connection, we refer the Court to *Ohio ex rel. vs. Northern Ohio Traction and Light Company*, 15 C. C. (n. s.) 577, wherein the same questions were involved that were decided in *Northern Ohio Traction and Light Company vs. Ohio ex rel.*, 245 U. S. 574, and wherein the Court of Ap-

peals of Stark County, Ohio, decided the question as this Court decided it. In the decision in that case, commencing at bottom of page 585, the Court of Appeals distinctly hold that the case of *East Ohio Gas Company vs. Akron, ante,* is not in point, and does not control in the character of the franchise in question there, which was similar as respects duration to that in the case at bar. We also desire to refer the Court to the decision of Judge Scofield in the instant case, when it was decided in the Common Pleas, which is found in our former brief at page 65 *et seq.* We quote from the decision as follows, from page 69:

> "If the Court is right in the interpretation of the statutes applicable to the rights of the defendant lighting company, and its franchise to use the streets is granted by the state, subject to the regulation of such use by the municipality, then the defendant was not operating under an indeterminate contract with the village, existing only as long as the parties could agree, and the case of *The East Ohio Gas Co. vs. City of Akron,* 81 O. S. 33, can have no application. Indeed in my judgment that case accords with and is an authority for many of the views expressed by this opinion. As held in that case if the franchise is granted by the state, then the state alone can complain of its abuse or mis-use and *quo warranto* would seem to be the appropriate remedy.
>
> *However, none of the statutes applicable to the defendant company could have received a construction in the Akron case, which related to a gas company, and as to which none of the statutes relating to an electric light company would have any application.* (The italics are ours.)

We also desire to quote from the syllabus of *Ohio ex rel. vs. Northern Ohio Traction and Light Company,* 15 C. C. (n. s.) 577, above cited, because that syllabus (2),

it seems to us, so fully states the law applicable to the present controversy:

> "*When a franchise or contract rights have been granted by an exercise of power duly conferred and such rights have become vested, no amendment or alteration of the charter or contract can take away the property or rights so vesting; where the grant is without a time limit, and there are no limitations upon the powers of the commissioners making the grant, the rights so conferred are not a mere grant at will, but are indeterminate or perpetual, and cannot be terminated by the commissioners, nor can such rights always be revoked by the General Assembly.*"

We also desire respectfully to observe that opposing counsel subjects the language with which Judge Davis opens the opinion in the *Akron case*, to an intent not contemplated by the learned judge, when counsel emphasizes the word "all." In the light of the statutes governing gas companies, which differ in their provisions from those governing electric light companies; in the light of the other decisions relating to the question, commented upon in our former and in this brief; in the light of the maxim *reddendo singula singulis*, which surely here applies, the language can only be held to mean all public service corporations of the same class, or in the same relation to the municipality.

V. The discussion in the opposing brief of Plaintiff in Error's authorities is beside the point.

It seems to us opposing counsel entirely misconceives our purpose in citing the cases he criticizes on pages 19 and 20 of his brief. We cite them to illustrate the principle involved and the doctrine applied, and not as containing a set of facts identical with the ones here

involved. There never are two set of facts exactly alike. It seems hardly necessary to reply to opposing counsel's attempt to distinguish the cases referred to. He only discusses three of them, and then dismisses all the many others with a wave of the hand, as it were.

The three he does refer to are not attempted to be distinguished, but in each case he supposes an entirely different state of facts, which he imagines resembles the facts in the case at bar, and then asks whether the decision in the case he is discussing would have been the same. For instance, in the first one, *Northern Ohio Traction and Light Company vs. Pontius*, 245 U. S., 574, opposing counsel asks what the decision would have been had the Traction and Light Company "taken up its tracks and removed all of the equipment used in the operation of its line, and put itself in such a position that it was utterly helpless to do or perform any of its obligations put upon it by its contract with the public." We presume counsel means that is what plaintiff in error did when it removed the poles and lamps previously used for street lighting. But this supposed case is not parallel to the case at bar, for, admittedly, plaintiff in error maintained, and still maintains, its equipment in the streets which is used for commercial lighting. (See opposing brief, p. 4; see, also recitations of ordinance of January 11th, 1915, p. 76 of our former brief; also, averments of petition, the purpose of filing which was to procure the removal of such equipment.) Neither is it true to say plaintiff in error was utterly helpless to do or perform its obligations to the public. Presumably it was not insolvent, and in fact was not; and at any time that the proper action was taken, either by contract or court action, it could have replaced the ob-

solete street lighting equipment with modern and efficient equipment. And it *was* and is performing a part of its duty to the public, for it was a public service corporation and, as such, it was its duty to furnish electricity for commercial uses in the village. Admittedly it was doing that, and always has done that.

In the case of *Russell vs. Sebastian*, 233 U. S. 195, (where the company undertook to extend service lines in a city and it was sought to prevent it, because, it was contended, the franchise did not extend any further than the actual physical user at the time), opposing counsel asks what would have been the decision had the company been attempting to excavate in the streets with a view to removing all of its property, etc. (p. 20 opposing brief). This supposed case is diametrically opposed to the case at bar, for plaintiff in error was not attempting to remove any of its property, but, on the contrary, then claimed and now claims the right to replace it with new, modern and more efficient equipment, and to do this by virtue of the rights previously vested in plaintiff in error, for the exercise of which such replacement is essential.

In the case of *Grand Trunk Ry. Company vs. South Bend*, 227 U. S. 574 (p. 20 opposing brief), counsel asks what the decision would have been if the company had taken up and removed its track and placed itself in such a position that it could not have rendered any of the services required of it as a public utility. What we have just said in reply to the comment on the preceding case is apposite here. We cannot be persuaded that the furnishing of electric current for commercial, as opposed to public, lighting is not a public service, and plaintiff in error is under just as much obligation to serve any

member of the public as it is the municipality. The fact, as we have before observed, that plaintiff in error has never ceased its public service, except to the extent of not lighting the streets after the cavalier treatment it received at the hands of the the council, and the further fact that it was solvent and could have lighted the streets at any time if the council and plaintiff in error could have agreed on prices which were not confiscatory, or failing to agree, if the council had exercised the power conferred by Section 3982 of the General Code, *ante*, (p. 5), and prescribed the rate for street lighting, and commercial lighting too, for that matter, if it deemed the rates charged by plaintiff in error to be excessive, not only show there was no abandonment of plaintiff in error's franchise rights, but show that it was still amenable to councilmanic action or court procedure. While we do not say the latter would have been necessary, yet when it comes to measuring the rights of the citizen, it is sometimes illuminating to see what remedy one has for the alleged denial of a right.

VI. The contention of plaintiff in error as to the character of its rights is admitted by defendant in error.

Opposing brief (pp. 21, 22 and 23) practically admits our contention with respect to the character of the right claimed by plaintiff in error. If counsel had gone one step further and admitted that vested rights, upon the strength of which large sums of money had long been invested in the faith of the security guaranteed by the state and federal constitutions, could not, by subsequent legislation or councilmanic action, be confiscated and destroyed, we would be content. It seems to us that this further step is so obvious that little more need be said

in support of the proposition. Section 9193 of the General Code, to which opposing counsel ascribes a world of merit, may be ever so good, but we are not, as counsel contends (p. 24 of opposing brief), asking this Court to declare that statute unconstitutional. What we do say is that its application to the rights of plaintiff in error would make it unconstitutional. And if, as he quotes from *Gilpin vs. Williams*, 25 O. S. 284, 294, "statutes should be construed liberally to avoid constitutional infirmities", then, we submit, that the statute in question cannot constitutionally be applied to plaintiff in error's vested and valuable rights, for to do so would be to make it obnoxious to the provisions of the Constitution of the United States referred to and quoted in our former brief.

The familiar rule of construction adopted in the classic instance where it was held that a statute, making it a criminal offense to let blood in the public streets of London, did not apply to the case of a surgeon who bled a patient who had suddenly fallen ill in the street, seems pertinent here.

Under the Constitution of Ohio, Article II, Section 28, (quoted in our former brief at page 31), and the pertinent part of which we here reiterate: "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; etc.", the section mentioned could not be given such an application as would make it retroactive or impair the contract obligation involved in the prior grant. And while this Court, we know, will follow the construction of the court of last resort of the state, so far as the state constitution is concerned, yet if it appear that the federal constitution has been violated by the decision be-

low, this Court will examine for itself the question with a view to determining the constitutional questions over which it has final jurisdiction.

Chicago, Burlington & Q. Ry. Co. vs. Chicago, 166 U. S. 226.

VII. Conclusion.

In closing, we desire to call the Court's attention to the significant admission contained in the opposing brief at page 25, where counsel says that the result of the decision of the Supreme Court of Ohio is

> "that it says to the plaintiff in error 'You may continue to use and enjoy the electric light plant you now have in that village, but you cannot place any more poles, wires and other apparatus used in connection with a street-lighting system, without the consent of such village,' *and when the plaintiff in error does this its franchise is as before.*"

We concede that the foregoing quotation correctly interprets the decision of the Supreme Court of Ohio, and that under the decision plaintiff in error can still perform its duty to the citizens of the community by furnishing electricity for everything but street lighting, but we contend,

First: That the sweeping language of the injunction granted by the decree here complained of prevents the plaintiff in error from maintaining or renewing that part of its plant used for commercial, as distinguished from street, lighting, and impairs the obligation of the contract rights secured by the franchise; and

Second: That the franchise is an entirety, and its exercise as an entirety cannot be curtailed in the manner attempted by the decree below, but that when the

occasion arises for plaintiff in error to do street lighting (which, of course, it would not do without a contract with the municipality) it has the right to erect the necessary poles, wires and lamps for that purpose.

And this is especially true if, as opposing counsel admits, plaintiff in error's franchise is as it was before the decision.

It must be manifest from a perusal of the opposing brief, and the animosities disclosed thereby, that the beginning of this action by defendant in error was animated by the desire for revenge for some fancied wrong. While the purpose behind litigation can ordinarily have no effect in determining and vindicating legal rights, yet, on the other hand, it may serve as an index to the good faith of negotiations, upon the failure of which litigation has been instituted.

Opposing counsel (bottom of page 23) seems to think that a reversal of the judgment below will leave the plaintiff in error with "nothing charged up against it as affecting its integrity, nor challenging its claim it did nothing of which it ought to be ashamed." Plaintiff in error never supposed its integrity or moral conduct was in question, and it certainly never challenged any criticism of the same. The fact that plaintiff in error carried out its predecessor's contract with the village, and for some nineteen months after its expiration continued to light the streets, and only desisted therefrom when the council, not exercising the statutory powers conferred upon it to fix rates, but endeavoring to secure plaintiff in error's consent to rates which it was not willing to put in the form of an ordinance and thus submit to judicial construction as to whether they were reasonable or not, or fair or confiscatory, declined further to pay

for the street lighting, is certainly not such a state of facts as to justify the strictures of opposing counsel.

If contrition is what opposing counsel wants, we are duly contrite; but forfeiture and confiscation of valuable vested rights, for which plaintiff in error paid a valuable consideration and in which stockholders have invested their money on the faith of constitutional guaranties, is not the punishment to be meted out by a court for impaired integrity, even should the conduct of plaintiff in error, in the circumstances above described, be considered "as affecting its integrity," which we deny.

May we be permitted at this point to call the Court's attention to two typographical errors which we have discovered in our former brief? On page 12 thereof, in the tenth line of Section 9192 of the General Code of Ohio which is there set out, the word "telephone" appears, whereas it should be "telegraph." On page 64 of said brief, in closing, the word "respectively" appears, whereas it should be "respectfully."

Respectfully submitted,

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Counsel.

Supreme Court of the United States

(October Term, 1910)

No. [redacted]10

THE HARDIN-WYANDOT LIGHTING COMPANY,
Plaintiff in Error,

vs.

THE VILLAGE OF UPPER SANDUSKY,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF DEFENDANT IN ERROR.

[redacted] R. HAHN,
Solicitor for Defendant in Error.

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SUPREME COURT.

AUTHORITIES CITED.

IN THE

Supreme Court of the United States

(October Term, 1916.)

No. 661.

The Hardin-Wyandot Lighting Company,
Plaintiff in Error,

vs.

The Village of Upper Sandusky,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

The Village of Upper Sandusky, Ohio, the defendant in error in this action, is the county seat of the County of Wyandot in the State of Ohio.

It was laid out by the Government of the United States in 1845, is a municipal corporation and at the time of the beginning of this action had, according to the last prior Federal census, a population of 3779.

Prior to the 4th day of March, A. D. 1889, the streets, alleys and public places of said village had been lighted by oil and gasoline lamps, but on that date an ordinance was passed by the council of said village granting certain privileges to The Citizens Electric Light & Power Co., its associates, successors and assigns, consisting of the right to use the streets, lanes, alleys, avenues and other public thoroughfares, for the purpose of erecting, maintaining and operating electric light wires, mains, apparatus complete for the manufacturing and distribution of electricity for lights and power.

The persons constituting The Electric Light & Power Company were all residents of said village, and these persons continued to be the owners of all of the property and assets of said company until some time during the year 1912, when the same were sold and transferred to the plaintiff in error, and this sale and transfer was made without the same being made known to said village.

At the time this transfer was so made there existed a contract between said company and said village whereby said village paid to said company a certain sum per year for each arc light for street lighting purposes.

This contract continued for some time after the plaintiff in error became the owner of said electric light plant, and when the same terminated the service continued and the monthly payments were made by the village, and this continued for some months or as long as the plaintiff in error maintained its street lighting system.

During the time such services were rendered and such payments were made, repeated efforts were made on the part of the defendant in error to get from the plaintiff in error such prices for lighting the streets, alleys, lanes and other public places, as would be fair, just and reasonable and such as said village could afford to pay,

and in order that said plaintiff in error should have in writing just what the defendant in error wanted, just what it deemed fair, just and reasonable, after extensive investigations as to what other villages of like size were paying for similar services, this defendant submitted to said plaintiff in error a full, fair and complete schedule of rates it proposed to pay for the lighting of said streets, alleys public places, etc., and for commercial current. This written proposal was in the nature of a contract and was so worded that its acceptance on the part of the plaintiff in error would have given to each party thereto all of the rights and privileges which would have been of mutual benefit and interest to all concerned, the said plaintiff would have received a fair, just and compensatory return for the services rendered and said village would have had the lights and current it desired.

This written proposal was submitted to the plaintiff in error on or about the 16th day of August, 1913, and was, by said plaintiff in error, on the 19th day of said month, arbitrarily rejected without any comment whatever as to the terms, conditions, prices or other things therein contained, and without any counter proposal as to such things as were therein contained, and with no new evidences as the part of said plaintiff in error that it cared to further continue negotiations with said village.

Within a very short time, not longer than 60 days, the said plaintiff in error demolished its entire street lighting system in said village without the knowledge or consent of this defendant in error; removed all lamps, wires and fixtures, cut down all its poles and completely removed every evidence of the fact that there had ever been a system in said village whereby the streets, lanes, alleys and other public places had ever been lighted by electricity.

From thence on until the beginning of this action—on August 1, 1914, no effort was made on the part of said plaintiff to renew negotiations looking towards a new contract with the defendant in error touching the lighting of the streets, nor furnishing commercial current at a satisfactory rate.

During this period of time the plaintiff continued to furnish commercial current to such consumers as it then had or afterwards acquired and was making great preparations to enlarge its then condition so that it could extensively increase its business, enlarge its profits and reap a reward for its owners by using the streets, alleys, lanes and other public places in said village to enhance their private gain, and at the same time being absolutely helpless and wholly unable to enter into any kind of a contract to light the public places of said village on account of its having destroyed its street lighting system and abandoned whatever rights it may have had to maintain such a system.

Under such a state of affairs and when it was evident by lapse of time that no new street lighting system was contemplated by said plaintiff in error, this action was commenced by the defendant in error against the plaintiff in error, in the Court of Common Pleas of Wyandot County, Ohio, seeking to have the rights of the plaintiff in error in the streets, lanes, alleys and other public places in said village terminated and the said plaintiff in error ousted therefrom.

In the Court of Common Pleas the finding was in favor of the now plaintiff in error.

An appeal was perfected by the village to the Court of Appeals of Wyandot County and there the case was heard *de novo and* this action resulted in a finding in favor of this defendant in error as follows:

> "It is therefore adjudged and decreed by the court that said defendant be forever enjoined and restrained from erecting poles, wires, lamps and other structures, in, upon or over the streets, alleys and public places within the corporate limits of said village, until the consent of said village shall have been obtained."

Error was then prosecuted to the now plaintiff in error to the Supreme Court of Ohio, and upon a hearing in that court the judgment of the Court of Appeals was affirmed, and it is from this judgment of the Supreme Court of Ohio that this action is now pending in this court.

This Action Ought Not to be in This Court.

No bill of exceptions was ever taken from the Court of Appeals of Wyandot County to the Supreme Court of Ohio, so that all that was before the latter court were the pleadings as is shown by the finding of that court as set forth in the opinion of Judge Johnson, although there appeared in the record printed and filed in that court an agreed statement of facts on which the case was tried in the Court of Appeals.

This same agreed statement of facts appears printed in the record of the case in this court, evidently with the intent to give it status of having been before the Supreme Court of Ohio in a manner authorized by law.

> "An agreed statement of facts, although in writing signed by counsel of all parties and filed, does not become a part of the record unless brought upon the record by a bill of exceptions, or the facts as agreed upon are stated in the journal entry as the court's finding of facts."
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> Goyert vs. Eicher, 70 Ohio St., 30.

There being no bill of exceptions in the Supreme Court of Ohio, and there being no bill of exceptions taken

from the Supreme Court of Ohio, there is nothing before this court for it to pass upon other than the simple question, *does the petition state facts sufficient to justify the decree complained of.*

This question has been decided in the affirmative by both the Court of Appeals and the Supreme Court of Ohio, and having been so decided, and the plaintiff in error having failed to test the sufficiency of said petition in any of the Ohio courts, either by demurrer or motion to make more definite and certain, it seems like an utter waste of this court's time to again be called upon to pass upon it.

There being no bill of exceptions before the Supreme Court of Ohio, that court was compelled to assume that all of the allegations of the petition were proven, were sustained by the evidence, and that being the case, the petition having stated facts sufficient to constitute a cause of action, there was nothing else for the court to do but affirm the Court of Appeals.

This being the case, this action ought not to be here for the reason that if both of the higher Courts in Ohio, have found in favor of the defendant in error, and there is nothing before this court by way of a bill of exceptions which would give this court more information than the Supreme Court of Ohio had, then the judgment of such court should be sustained and affirmed as a matter of right.

ARGUMENT.

Should this court deem this case so before it as to disregard the claim that it ought not to be here, and that it should be passed upon as to its merits, then, on behalf of the defendant in error, I desire to call the court's especial attention to what I believe to be the law governing all matters in dispute between the parties to this

action and especially to the fact that a judgment in favor of the defendant in error, after presentation of evidence in the way of an agreed statement of facts had been presented and argument, both by way of briefs and orally had been made, the Court of Appeals found in favor of the defendant in error, and that when error was prosecuted by the plaintiff in error to the Supreme Court of Ohio, that court, after extensive argument, orally and by brief, affirmed the court below and held that the village of Upper Sandusky, Ohio, the present defendant in error should have the relief prayed for in its petition, the finding, judgment and decree of this court being the bone of contention now before Your Honors.

In order that this court may have before it the fact and just what the Court of Appeals did find, I herein insert the finding as it appears of record, and I do this in order that the acts of the Supreme Court following may be better understood.

> "Be It Remembered, That at the January Term of the Court of Appeals of Wyandot County, Ohio, A. D. 1915, to-wit: On the 6th day of August, 1915, an order was made herein and duly entered upon the journal thereof in the words and figures following to-wit. *The Village of Upper Sandusky, Ohio, plaintiff vs. The Hardin-Wyandot Lighting Company, defendant.*
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> This cause came on to be heard upon the pleadings and the agreed statement of facts, was argued by counsel and submitted to the court and was, by the court, taken under advisement.
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> And the court coming now this 6th day of August, 1915, to render its decision herein, do find that injunction is not the proper remedy to determine the rights of the defendant company under the franchise claimed under the ordinance granted to the predecessor in interest of the defendant, but that *quo warranto* is the appropriate and only remedy for determining that question; to which finding and decree of the court the said plaintiff excepted and still excepts.

And the court further find that the plaintiff is entitled to the relief prayed for in its petition, to the extent that the defendant company cannot make use of the streets, alleys and public ways of said village for the purpose of erecting poles, wires and lights and other structures thereon and thereover without the consent of said village; and that the prayer of the petition should be granted to the extent that said defendant should be enjoined from erecting poles, wires, lamps or other structures, in, upon and over the streets, alleys and public places in said village of Upper Sandusky, Ohio, until the consent of said village shall have been obtained.

It is therefore adjudged and decreed by the court that said defendant be forever enjoined and restrained from erecting poles, wires, lamps, and other structures, in, upon or over the streets, alleys and public places within the corporate limits of said village, until the consent of the said village shall have been obtained.

It is further ordered that said plaintiff recover its costs against said defendant, and execution is awarded therefor."

It will be noted by this court that it was during the pendency of this action in the Court of Appeals in Wyandot County, Ohio, that the plaintiff in error filed its supplemental answer and cross petition setting up the fact that a certain ordinance had been lately passed by the council of the Village of Upper Sandusky, Ohio, the defendan in error herein, repealing the ordinance of March 4th, 1899, granting the original franchise, under which the plaintiff in error claims its right to use the streets, alleys and public places in said village for the purpose of operating an electric light and power plant.

To this pleading a reply was filed by the defendant in error admitting the passage of the ordinance and denying all other allegations therein contained.

It will also be noted by this court that no claim was ever made by this defendant in error, in any court of Ohio, that any relief was being sought by reason of the passage of such ordinance, nor has this defendant in error sought to claim or enforce any right it may have under the same.

This defendant in error bases its contention on the allegations contained in the petition filed in the Common Pleas Court on the 1st day of August, 1914, and has maintained its fight to secure its rights on this petition alone.

The passage of that ordinance by the council of the defendant in error was not done with a view of affecting this suit then pending, nor was it ever relied upon in any manner to effect the outcome of the same.

After the case was disposed of in the Court of Appeals, the same was, on error, taken to the Supreme Court of Ohio, and the same was fully heard by that court.

I am of the opinion that I can throw no better light on the law governing this action, and can put it in no better nor more concise form than to here quote the opinion of Judge Johnson rendered in deciding this case in that court.

Opinion of the Ohio Supreme Court.

Johnson, J.:

Although the entry of the decree in the Court of Appeals recites that the cause was heard on the pleadings and an agreed statement of facts, the record here does not show that any bill of exceptions was taken in that court and no agreed statement of facts was given judicial sanction by any authentication of the court. Therefore the only question left which this court is authorized to consider is whether the petition states facts sufficient to justify the decree complained of.

It is averred in the pleading that in March, 1889, the village passed the ordinance granting the franchise to The Citizens Electric Light & Power Company.

The plaintiff in error rests its case here on the broad proposition that the right to distribute electricity over the streets on the village eminates from the state and not from the municipality. It is contended that the plaintiff in error and its predecessor were organized under the laws of Ohio, with all the powers and privileges granted to telegraph and telephone companies by Section 9170 *et seq.* General Code, and that therefore no village ordinance was necesary to make its rights effective, except such as relate to the mode of use.

Section 9170 provides that "A magnetic telegraph company may construct telegraph lines from point to point, along and upon any public road," etc., and Section 9178 enacts that when when lands authorized to be appropriated for the use of such company are subject to the easement of a street, alley, public way or other public use, within the limits of a city or village, the mode of use shall be such as agreed upon between the municipal authorities and the company.

If they cannot agree, or if the municipal authorities unreasonably delay to enter into an agreement, the Probate Court of the county shall direct in what mode the line shall be constructed along such street, etc.

Section 9191 provides that the provision of this chapter shall apply also to a company organized to construct a line or lines of telephones.

In *City of Zanesville vs. The Zanesville Telegraph & Telephone Co.*, 64 Ohio St., 67, it was said, at pages 80 and 81: "It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the mode of such use that becomes the

subject of the agreement or judicial determination."

In *Farmer et al. vs. The Columbiana County Telephone Co.*, 72 Ohio St., 526, it is held: "Telephone companies organized in this state obtain power to construct their lines along the streets and public ways of municipal corporations from the state by virtue of Sections of the Revised Statutes 3454 to 3471-8 inclusive, and not from the municipal authorities." And in *The Queen City Telephone Co. vs. City of Cincinnati*, 73 Ohio St., 64, it is said, at page 81: "It is of course conceded as now well settled that the general power to occupy the streets of a municipality by a telephone company is derived from the state."

It is contended by the plaintiff in error that Sections 9192 and 9193, General Code, confer upon electric light and power companies all of the powers conferred upon telegraph and telephone companies in the sections above referred to.

In the consideration of this contention it is necessary to briefly review the history of legislation on the subject. The sections of the General Code above mentioned are included in Sections 3454 *et seq.* Revised Statutes. Those sections were in effect at the time the transactions involved in the cases above mentioned occurred, and were in effect long before the granting of the franchise described in the petition in this case.

The first enactment touching the power of companies organized for the purpose of supplying electricity for lighting streets, etc., was passed May 12, 1886 (83 O. L., 143), and authorized such companies to construct lines for conducting electricity for power and light purposes through alleys, etc., "with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe." Prior to 1886, there was no statute conferring power on the municipality to grant to an electric light company the right to erect poles. In the following year the act of January 26, 1887, (84 O. L., 7), was passed as a supplementary section to sections 3454 to 3471, being numbered Section

3471a. It provided that the provisions of the chapter (telegraphs and telephones), so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, squares and public places with electric light and power. This act did not repeal the Act of May 12, 1886, *supra*, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies "the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies." This was the state of the law as the time of the granting of the franchise (March 4, 1889), which is involved in this case. Therefore, under the holdings in the cases cited, the grantee company derived its general power to occupy the streets from the state.

On April 21, 1896 (92 O. L., 205), Section 3471a was amended. This act made the provisions of the chapter as to telegraphs and telephones applicable, except Section 3461, which conferred power upon the Probate Court to determine the matter in the respects stated if the company and the municipal authorities failed to agree. This amendment of 1896 provided that in order to subject the same to municipal control alone, no person or company shall place, construct or maintain any line for lighting through any street, alley, etc., without the *consent* of such municipality. These provisions substantially have been carried into the General Code in Sections 9192 and 9193.

The Act of 1896 discloses that the legislature was not content to clothe electric light companies in municipalities with the same powers with which it had invested telegraph and telephone companies. The change was made in the light of experience, and the sound and substantial reasons of public policy which dictated the change would seem to be manifest.

There is a clear distinction between telegraph and telephone companies on the one hand and electric light companies on the other. The reasons why the state should desire to reserve to itself

the right to grant franchises for the use of public highways to telegraph and telephone companies do not apply to electric light companies. Telegraph and telephone systems pervade the entire state. They pass in and out of cities, and villages and through the rural districts, connecting the whole in a vast net work. It might result in great public inconvenience if such municipality had the absolute right to arbitrarily grant or refuse permission to pass through its limits. It is easy to conceive that in many instances such an arbitrary right could be used to foster monopolies and combinations to the detriment of the general welfare. Generally speaking, these suggestions do not apply to an electric light company.

As a general rule an electric light company is formed for the purpose of furnishing light to the municipality in which it is located and to its people. Its plant, its poles, wires and equipment are generally located there. But in addition to this, a more important consideration is that a system of telegraphs and telephones, is comparatively harmless to life and property, while a system of electric lighting is highly dangerous to life and property.

These are substantial reasons why the local authority should be vested with larger power to deal with a matter of such nature and which comes in such close contact with its own people, than is necessary with reference to telegraphs and telephones. However, these matters are wholly within the power of the legislature, which, when exercised, must be judicially enforced.

The purpose of the act of 1896, now Sections 9192, 9193 and 9194, General Code, was to invest the municipality itself with the power to make the grant. It specifically excepts the provisions of Section 3461, Revised Statutes, and it expressly provides that in order to subject the same to municipal control alone, no company shall place electric wires for lighting, heating or power purposes in the streets of the city or village without the consent of such municipality. The elimination of Section 3461, Revised Statutes, and the use of the word "alone" abrogate the power of the Probate

Court to act in such cases, and this is followed by the express provision requiring the *consent* of the municipality.

We are convinced, therefore, that the contention of the plaintiff in error that Section 9170 *et seq.*, General Code, as now in force, clothe the electric light companies with all the powers of telegraph and telephone companies, is unsound.

None of the statutory provisions which are held, in the cases cited, to deny the power of the municipality to determine the right of the telegraph and telephone companies to occupy the streets, etc., is included in the sections of the General Code relating to electric light and power companies. On the contrary, those sections contain a positive grant of such power to the municipality.

However, as pointed out, the ordinance in question here was passed in 1889, while the act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the Court of Appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of court, we are not able to estimate the force of plaintiff in error's argument with reference to it.

We are compelled to assume that the allegations of the petition were sustained by the evidence and that the defendant, without the knowledge or consent of the plaintiff, removed all of its street lights from the streets, avenues and other public thoroughfares in the village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street lighting system and rendered itself wholly unable to furnish and electricity whatever for the purposes of public lighting. It is manifest from Section 3 of the ordinance that the parties contemplated public lighting as an essential consideration leading to the granting of the franchise which was accepted by the predecessor of the plaintiff in error.

In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be

entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandons without the consent of the village in accordance with existing law.

The judgment and decree of the Court of Appeals will, therefore, be affirmed.

Contention of Plaintiff in Error.

The contention of the plaintiff in error seems to be that whatever is wrong with it, and whatever has placed it in the position it now occupies is wholly the fault of this defendant in error. That whatever difficulties it now finds itself in and whatever troubles it is now having results exclusively from the acts of the defendant in error and that it, the plaintiff in error, is free from any and all blame, and ought now to be permitted to go its way freed from any and all blame and be allowed to again assume the position it held in the Village of Upper Sandusky, Ohio, before it became the owner of the franchise now in controversy, and that it stood in the same relation towards the defendant in error before the act herein complained of was committed by it.

When the plaintiff in error became the owner of this plant there existed a contract between the Light Co. and the village whereby the village paid $70 per light per year for 45 arc lights, the same to burn on the moon light schedule and until one o'clock in the morning.

For years there had been a rule that if any of the lights failed to burn during the period required, that a discount should be made at the end of each month for such "outage" and the bill paid less this discount.

When this contract expired in January, 1913, the plaintiff was then too busy to appear before the council and ask for a new contract and no effort was made to

renew the contract for more than six months after the old one had expired. Then began a long period of negotiations with an effort on the part of the village to secure the best terms possible, both for street lighting and for commercial use.

Two verbal propositions were made in open meeting as to what the plaintiff in error would furnish current and light the streets, neither one in writing, in fact no written proposal of any kind was ever made by the plaintiff in error either to light the streets or for current for commercial use, so that as a matter of fact the council of said village never had from the plaintiff in error anything in writing looking towards a settlement of the matters existing between them.

All bills for street lighting had been promptly paid less the small sums deducted for services not rendered, and there was no apparent reason for the plaintiff so to do, yet without saying one word about it, without the knowledge or consent of this defendant in error, the plaintiff in error, with men and teams and drays started out early in the morning and began to demolish the street lighting system and worked with such diligence that before the end of the day there was not any visible evidence that there had ever been such a system in the village, the result of all of which was that the village was left in absolute darkness and so continued until other arrangements would be made at great expense to the village.

This vile thing was done by the plaintiff in error after long and deliberate calculation and with the sole purpose in view of driving the defendant in error to accept the terms of the plaintiff in error for street lighting. No other reason then or has ever existed for this act and the doing of it was so contemptible that honest men hated to mention it or to have it mentioned to them.

This state of affairs continued for nearly a year during which time no effort was made by the plaintiff to secure a contract to light the streets, no effort was ever made by the plaintiff in error to again establish a street lighting system nor was any effort made by the plaintiff in error to put itself into such a position that it could have furnished light for the streets should the defendant in error ever have demanded the same.

Thus matters continued until this action was instituted and thus the condition of the plant of the plaintiff in error continues to remain, useless and worthless for public lighting of any kind.

That such a state of affairs might not have taken place is plain from the fact that after careful investigation by the Light Committee of the council of the defendant in error, and after a full and free comparison of the rates offered by the plaintiff in error and by those demanded and received in other villages, this defendant prepared and submitted to the plaintiff a full, fair and reasonable schedule of what it was willing to pay for the services required, putting the same into the shape of a franchise very favorable to the plaintiff in error as to what was required by the defendant in error in the way of equipment, lamps, etc., which said schedule and proposal was immediately spurned and rejected by the plaintiff in error, but no other or different schedule or proposal was submitted in return.

The franchise made in March, 1889, under which the plaintiff in error holds its alleged rights in the Village of Upper Sandusky, contained no stipulation as to when it should terminate and thereby became, in effect, perpetual.

This being the case, and it appearing from the efforts made by the defendant in error to arrive at some mutual ground on which both parties could stand, and the fail-

ure of these efforts to produce the desired effect, it became apparent that the parties to said franchise could no longer agree and that it ought to be disposed of so that the defendant in error could look elsewhere for the commodity it needed and to look to some other source for the services it required.

> "Where the contract between a municipal corporation and an incorporated company is silent as to the duration of the franchise, such franchise is not perpetual but the duration thereof is simply indeterminate, existing only so long as the parties mutually agree thereto."
>
> East Ohio Gas Co. vs. The City of Akron, 81 O. S., 33.

Plaintiff in error in its brief claims that this case does not apply to the plaintiff in error in this action for the reason that it derived its right to the streets in said village from the state and therefore has higher and better rights than an ordinary corporation.

The plaintiff in error is a public utility, or a public service corporation and comes under the rules and laws laid down for the regulation of such corporate bodies.

In the above entitled case (*Gas Co. vs. Akron*) Judge Davis, in rendering the opinion, says this:

> "This case was argued orally and submitted six months ago, but on account of its great importance to the public as well as to *all* public service corporations, we have given it unusual consideration and we have reached our conclusions only after most careful deliberation."

It will be seen from the above quotations from the case cited that this action was properly brought; that for that part of the plant the plaintiff in error had demolished injunction was the proper remedy to prevent its restoration without the consent of the village and that this defendant was simply seeking to enforce its rights when it instituted this proceeding.

Authorities Cited by Plaintiff in Error.

I do not think that the authorities cited by the plaintiff in error apply to the facts in this case, that while the law, as laid down in those cases, sustains the contentions made in the pleadings, there is nothing in any of the cases mentioned in any manner similar to the facts set forth, and proven, in the case at bar.

In the case of the *Northern Ohio T. & L. Co. vs. Pontius*, 245 U. S., 574, the Commissioners of Starke County, Ohio, sought to oust the company from the public highways for the reason that the fares had been raised, the effort so to do being based on the ground that the company had no right under its franchise so to do. Their action failed and the decision of the court was right.

But what would have been the decision of the court had the facts shown that the company had taken up its tracks, removed all of the equipment used in the operation of its line and put itself in such a position that it was utterly helpless to do or perform any of the obligations put upon it by its contract with the public. Would the court then have said that the authorities of that county were without remedy and that the company could continue to hold its franchise after it had violated all the terms thereof and voluntarily ceased to do business. We think the company would have been without standing in court.

In the case of *Russell vs. Sabastian*, 233 U. S., 195, a Light Co. undertook to extend its service lines and pipes on a new street and in making an excavation an employee was arrested. Such litigation followed that the question of the franchise was brought into court and the right of the company so do so was challenged, the result being a decision in favor of the company.

What would have been the decision had the company been attempting to excavate in the street with a view of removing all of the property it had put there with a view of complying with its duties as a public utility and putting itself in such condition that it could not render any of the services it was bound under the law and the terms of its franchise to do and an action should have been maintained against it for the forfeiture of its franchise rights, would the decision of the court have been as it was? We think not.

In the case of *Grand Trunk Ry. Co. vs. South Bend*, 227 U. S., 574, the plaintiff had secured the right to lay tracks in the streets of South Bend and upon one street (Division) it had the right to lay a double track.

A part of this double track had been laid, and when the business of the company demanded an extension of this double track and an effort was being made by the company to make the extension, an action was begun to prevent the company from so doing. After the case had reached this court and was heard, this court decided that the company had a right to double track its lines on this particular street. Under the law and the terms of the contract this decision was right.

What would have been the decision if the company had taken up and removed its track and placed itself in such a position that it could not have rendered any of the services required of it as a public utility?

Would it then be said by this court that it still had the right to use, occupy and control the streets for its own private use without being able to render any service to or for the public. I do not think such a decision would have been made.

And so on as to the other authorities cited by the plaintiff in error. Not one of them presents a state of facts in any manner similar to the facts in this case and the rules laid down in them do not and cannot apply here.

Constitutionality.

On the 1st day of May, 1852, the legislature of Ohio passed an act enabling the formation and establishment of Magnetic Telegraph Companies. Section 47 of said act is now Section 9170 of the General Code of Ohio, and is as follows, to-wit:

> "Sec. 9170. A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers, abutments necessary for the wires; but shall not incommode the public in the use thereof."
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> Ohio Laws, Vol. 50 page 288.

On the 31st day of March, 1865, a supplementary act was passed by said legislature to further enable the organization of Magnetic Telegraph Companies. Section 5 of said supplementary act being now Section 9178 of the General Code of Ohio, and is as follows, to-wit:

> "Sec. 9178. When lands authorized to be appropriated to the use of such company are subject to the easement of a street, alley, public way, or other public use, within the limits of a city or village, the mode of use shall be such as is agreed upon between the municipal authorities of the city or village and the company. If they cannot agree, or the municipal authorities unreasonably delay to enter into an agreement, in a proceeding instituted for the purpose, the Probate Court of the county shall, subject to the provisions of section eleven thousand forty six of the General Code, direct in what mode the telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of it."
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> Ohio Laws, Vol. 62, page 74.

On the 26th day of January, 1887, the legislature of Ohio, passed supplementary to the magnetic telegraph act a new act, designated as section 3471a of the Revised Statutes of Ohio, as follows, to-wit:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric lights and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

Ohio Laws, Vol. 84, page 7.

On the 21st day of April, 1896, the Legislature of Ohio amended Section 3471a, Revised Statutes, and that part of it which is of interest in this case was numbered Section 9193, General Code, and is as follows, to-wit:

SEC. 9193. In order to subject such companies to municipal control alone, no person or company shall place, string, construct or maintain a line, wire, fixture or appliance of any kind to conduct electricity for lighting, heating or power purposes through a street, alley, lane, square, place or land of a city or village without the consent of such municipality. This inhibition also extends to all levels above or below the surface of such public ways, grounds or places, as well as along their surfaces, but not to rights heretofore received through and exercised under, proceedings of a Probate Court."

Ohio Laws, Vol. 92, page 204.

It will be noted by the foregoing excerpts of the Statutes of Ohio, that at the time the franchise in controversy in this action was passed by the council, to-wit: March 4, 1889, that an electric light company had the same rights in the roads, streets, alleys and other public places as had the magnetic telegraph. That it could enter in and upon the streets of a village or city without asking the consent of the municipality, and that the only right the municipality had in the matter was the privi-

lege of prescribing the *mode* in which the entry could be made, and if the municipality delayed the matter, in the opinion of the company, an unreasonable time, then, no the application of the company, the Probate Court could prescribe the *mode*.

When this act was passed in 1887, not much was known about electric light companies, but as time went on it was found that the commodity handled by such companies was of such a dangerous nature that the cities and villages through and into which the lines of such companies passed, ought to have some means of protecting the lives and property of the citizens thereof, and this thought on the part of the legislature resulted in the passage of the law now known as Sec. 9193, above quoted.

There is a world of merit in the passage of this act in 1896, and it has worked, no doubt, as much good as any act passed by the law making power of Ohio, and never once has it been shown that it has worked a hardship upon any citizen of this state.

No one ever had occasion to question its constitutionality until the plaintiff in error, seeking an excuse for its own folly, and for some place to lay the blame for its own premeditated act in the destruction of its own property, now seeks to regain what it has lost by saying that the act, which now says what it shall do in order to regain and repossess what it has lost, is unconstitutional and void, and that the deliberately planned act of demolishing its street lighting system shall not inure to its loss, but that it shall have the right to again enter in and upon the streets of the defendant in error and use and enjoy the same as in the first place and with nothing charged up against it as affecting its integrity nor challenging its claim that it did nothing of which it ought to be ashamed.

There is no merit in the claim of the plaintiff in error as made in its brief now before this court that this statute is unconstitutional.

This matter has been before both the Court of Appeals and the Supreme Court of Ohio; both of these courts are courts of high ability and courts whose opinions are worthy of careful consideration and of great weight.

When the constitutionality of a statute is challenged it is the duty of a court to give effect to all parts of it and to construe it very liberally in favor of its validity.

> "Statutes should be construed liberally to avoid constitutional infirmities."
>
> Gilpin vs. Williams, 25 Ohio St., 284-294.

The plaintiff in error in this case deliberately took itself out from under the protecting folds of Section 9178 of the General Code of Ohio, and did it with the express intention and object of forcing the defendant in error to comply with the unfair, unreasonable and unjust rates demanded, and when it found that this process did not bring to it the end desired and that it had lost what it had formerly enjoyed, in its insane desire to again claim the rights and privileges it has lost, it is now asking the highest court in the world to declare that one of the most beneficial statutes in Ohio is null and void because of its unconstitutionality, and especially is this the case after the same question has been passed upon by the highest court in Ohio.

There is no more merit in this claim than there is in the claim of the plaintiff in error that the franchise under which it had been occupying the streets in the Village of Upper Sandusky, has been divided by the decision of the Ohio courts.

The petition in this case states a cause of action, the court must assume, in the absence of a bill of exceptions,

that all of the averments of the petition have been proven and that the defendant in error was entitled to the relief granted; that being done, the result of this decision is simply that it says to the plaintiff in error, "You may continue to use and enjoy the electric light plant you now have in that village, but you cannot place any more poles, wires and other apparatus used on connection with a street lighting system without the consent of such village" and when the plaintiff in error does this its franchise is as before. The allegations of the petition having been proven, it follows that the decisions of the Ohio courts are in accord with the evidence and the law of the state, and that they should be sustained.

I especially call the attention of this court to the very able opinion of Judge Johnson in announcing the decision of the Ohio Supreme Court in this case, as I fully believe that it states the law governing this case; that it is ably written, convincing in argument and is worthy of being followed by this court.

With the fullest belief in the justness of the defendant in error's claim for relief in this matter; with the hope that there are some things of value to this court in the foregoing brief and with a prayer for the affirmance of the judgment of the Ohio court, I submit the case on behalf of the defendant in error.

Respectfully submitted,

W. R. HARE,
Solicitor for the Defendant in Error.